87-260

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GENERAL DYNAMICS LAND SYSTEMS, INC.
Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA AND ITS LOCAL 1200
Respondents.

GENERAL DYNAMICS LAND SYSTEMS, INC.
Petitioner,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR AND OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

I.

Did The United States Court of Appeals For The District Of Columbia Circuit Overstep The Bounds Of Its Reviewing Authority When It Struck Down And Replaced A Significant And Longstanding Interpretative Regulation (29 C.F.R. § 1910.5(f)) Promulgated By the Secretary of Labor Under The Occupational Safety And Health Act That Was Not Challenged By Any Party?

II.

Did The Court of Appeals Fail To Give Proper Deference To The Judgment Of The Occupational Safety And Health Review Commission When It Ruled That The Commission's Opinion Applying And Distinguishing A Prior Decision Was Arbitrary And Capricious?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
PROCEEDINGS BELOW	1
JURISDICTION	3
STATUTE AND REGULATION INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
I. THE COURT OF APPEALS'S DECISION IMPROPERLY ENCROACHES UPON OSHA'S AUTHORITY TO INTERPRET THE ACT	11
II. *CON AGRA* WAS PROPERLY CONSIDERED, APPLIED, AND FACTUALLY DISTINGUISHED BY THE COMMISSION	21
CONCLUSION	30

TABLE OF AUTHORITIES

Page

A. Prokosch and Sons Sheet Metal, Inc., 8 O.S.H. Cas. (B.N.A.) 2077 (Review Commission 1980) 9, 14, 20

American Maritime Assn. v. United States, 766 F.2d 545 (D.C. Cir. 1985) 9, 14

Brennan v. Butler Lime & Cement Co., 520 F.2d 1257 (D.C. Cir. 1973) 9, 13

Con Agra, Inc., McMillan Company Division, 1983 C.C.H. O.S.H.D., ¶ 26,420, p. 33,523, 11 OSHC (BNA) 1141 ..... 7, 9, 13, 19, 21-29

Conference of State Bank Supervisors v. Conover, 715 F. 2d 604, (D.C. Cir. 1983), *cert. denied*, 466 U.S. 927, 80 L.Ed. 2d 181, 104 S. Ct. 1708 (1984) 9, 15, 16

Donovan v. A.A. Biero Constr. Co., 746 F.2d 894 (D.C. Cir. 1984) 20

Environmental Protection Agency v. National Crushed Stone Assn, 449 U.S. 64, 66 L.Ed. 2d 268, 101 S. Ct. 295 (1980) 8, 14

Federal Housing Administration v. The Darlington, Inc., 358 U.S. 84, 3 L.Ed. 2d 132, 79 S. Ct. 141 (1958) ... 16

Federal Election Comm'n v. Democratic Senatorial Campaign Committee, 454 U.S. 27 (1981) 16

Illinois State Board of Educatior v. Socialist Workers, 440 U.S. 173, 59 L.Ed. 2d 230, 99 S. Ct. 983 (1979) 23

Johnson v. Robison, 415 U.S. 361, 39 L.Ed. 2d 389, 94 S. Ct. 1160 (1974) 9, 14

National Realty and Construction Company v. Occupational Safety and Health Review Commission, 489 F.2d 1257 (D.C. Cir. 1973) 9, 13

Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 77 L.Ed. 796, 53 S. Ct. 350 (1933) 16, 18-19

Phelps Dodge Corp., Morenci Branch, 9 O.S.H. Cas. (B.N.A.) 1222 (ALJ 1980) 9, 13

TABLE OF AUTHORITIES — (Continued)

Page

Sherwood Medical Indus., Inc., 9 O.S.H. Cas. (B.N.A.) 1405 (ALJ 1981) 9, 13

Sun Ship Building and Dry Dock, 1973 O.S.H.D. ¶ 16,725, p. 21,474 ..... 10, 14, 17-18

Ted Wilkerson, Inc., 1981 O.S.H.D. ¶ 25,551, p. 31,855 9, 14

Todd's Shipyards Corp., 81 O.S.H.A.R.C. 69/A2, 9 B.N.A. O.S.H.C. 2031, 2034 1981 C.C.H. O.S.H.D. ¶ 25,516 at p. 31,812 (No. 77-2545, Review Comm. 1981) 12, 24, 25

Tom's River Chemical Corp., 1978 O.S.H. Dec. (C.C.H.) ¶ 23,122 (ALJ) 9, 14

Udall v. Tallman, 380 U.S. 1, 13 L.Ed. 2d 616, 85 S. Ct. 792 (1965) 8, 9, 14, 16

United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 97 L.Ed. 54, 73 S. Ct. 67 (1952) 23

United States v. American Trucking Association, 310 U.S. 534, 84 L.Ed. 1345, 60 S. Ct. 1059 (1940) 16

Usery v. Marquette Cement Mfg. Co., 568 F.2d 902 (2d Cir. 1977) 9, 18

Washington Assn for Television and Children v. F.C.C., 712 F.2d 677 (D.C. Cir. 1983) 9, 14, 18

Webster v. Fall, 266 U.S. 507, 69 L.Ed. 411, 45 S. Ct. 148 (1925) 23

United States Statutes and Regulations:

29 U.S.C. § 651 ..... 1, 4

29 U.S.C. § 654(a) 3, 11, 15

29 U.S.C. § 654(a)(1) ..... *passim*

29 U.S.C. § 660(a) 27

29 U.S.C. § 661(j) 5

TABLE OF AUTHORITIES — (Continued)

Page

United States Statutes and Regulations:

28 U.S.C. § 1254 3

29 C.F.R. § 1910.5(c)(1) 5

29 C.F.R. § 1910.5(f) ..... *passim*

29 C.F.R. § 1910.1000(a)(2) 1, 21

29 C.F.R. § 1910.1000(a)-(e) 4-6, 12, 23-26

29 C.F.R. § 1910.1000(d)(1)(ii) 12

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D. Morgan and M. Duvall, *OSHA's General Duty Clause: An Analysis of Its Use and Abuse*, 5 Industrial Relations Law Journal 283 (1983) 17

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GENERAL DYNAMICS LAND SYSTEMS, INC., Petitioner herein, requests that a Writ of Certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review whether the Court of Appeals overstepped the bounds of its reviewing authority when it vacated a final order and decision of the Occupational Safety and Health Review Commission.

PROCEEDINGS BELOW

On November 29, 1983, the Secretary of Labor cited General Dynamics Land Systems, Inc. ("General Dynamics")[1] for an alleged willful violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (hereinafter the "Act"). The Citation, attached hereto as Appendix A, contained two primary parts: (1) an alleged willful violation by General Dynamics of the "general duty clause," Section 5(a)(1)[2] of the Act, and (2) a single instance of alleged employee overexposure to 1,1,2 trichloro 1,2,2 triflouroethane in excess of the permissible limit prescribed in 29 C.F.R. § 1910.1000(a)(2) and in violation of requirements of administrative and engineering controls mandated by 29 C.F.R. § 1910.1000(e). *See* attached Appendix B.

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[1] General Dynamics Land Systems, Inc. is a wholly owned subsidiary of General Dynamics Corporation. General Dynamics Land Systems, Inc. has no subsidiaries or affiliates of its own that are not wholly owned. The Company was improperly identified in the proceedings below in this case as "General Dynamics Land Systems Division, Inc."

[2] Section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1), provides:

> Each employer —
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

General Dynamics contested the Citation, and the case was assigned to an Administrative Law Judge ("ALJ") of the Occupational Safety and Health Review Commission (hereinafter the "Commission"). A hearing was held at which the Secretary of Labor (the "Secretary") and General Dynamics presented evidence and also at which the United Auto Workers ("UAW" or the "Union") elected party status as employee representative.

After the seventeen day hearing, the ALJ, on July 30, 1985, issued a decision, attached as Appendix C, vacating the Citation in its entirety. The Secretary and the Union then petitioned the Commission for review of the ALJ's decision. When no Commissioner directed an internal review of the decision, the ALJ's decision and order became a Final Order of the Commission. *See* attached Appendix D.

On November 19, 1985, the Union filed a Petition for Review with the United States Court of Appeals for the District of Columbia Circuit. On November 20, 1985, the Secretary of Labor filed a Petition for Review with the United States Court of Appeals for the Eighth Circuit. The two cases were subsequently consolidated in the Court of Appeals for the District of Columbia Circuit (hereinafter the "Court of Appeals").

On April 14, 1987, the Court of Appeals issued an opinion, attached as Appendix E, granting both petitions for review. The Court of Appeals vacated that part of the Commission's order that had vacated the Citation under the "general duty clause" of the Act and remanded the cases back to the Commission with instructions that the Commission address the merits of the alleged general duty clause violation by General Dynamics. On May 29, 1987, General Dynamics petitioned the Court of Appeals for rehearing and/or rehearing *en banc*, which Petition was denied. *See* attached Appendix F.

JURISDICTION

The Court of Appeals denied General Dynamics' Petition for Rehearing and/or Suggestion for Rehearing En Banc on June 18, 1987. This Petition for Certiorari is thus being filed within sixty days thereafter.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTE AND REGULATION INVOLVED

29 U.S.C. § 654(a):

Each employer —

(1) shall furnish to each of its employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employment;

(2) shall comply with the Occupational Safety and Health standards promulgated under this chapter.

29 C.F.R. § 1910.5(f):

An employer who is in compliance with any standard in this part shall be deemed to be in compliance with the requirements of Section 5(a)(1) of the Act, but only to the extent of the condition, practice, means, method, operation, or process covered by the standard.

STATEMENT OF THE CASE

This case arises from a citation issued to General Dynamics by the Secretary of Labor for alleged willful violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (the "Act"). The violations are alleged to have occurred during the manufacture of M-1 Abrams tanks at the Detroit Arsenal Tank Plant. M-1 Abrams tanks have internal hydraulic systems that sometimes leak during assembly. General Dynamics' employees have used a solvent called 1,1,2 trichloro 1,2,2 trifluoroethane (the "solvent" or "freon") to clean up resulting oil spills. On September 21, 1983, an employee of General Dynamics was temporarily overcome allegedly by the fumes of the solvent, despite the fact that according to the employee's testimony, he ventilated the area where the solvent was used for more than 45 minutes in accordance with extensive training provided by General Dynamics to its employees with respect to the proper use of the solvent. *See* Decision of ALJ, Appendix C, pp. 21-22. Following an investigation of this incident, the Occupational Safety and Health Administration ("OSHA") on November 29, 1983 cited General Dynamics for an alleged violation of its statutory duty under subsection 5(a)(1) (the "general duty clause") to provide safe working conditions and for alleged violations of OSHA's specific standards governing employee exposure to freon, 29 C.F.R. § 1910.1000(a)(2) and (e). *See* Appendix A.

General Dynamics contested the citation and the matter was referred to an Administrative Law Judge ("ALJ"). After a seventeen day hearing, the ALJ issued a decision on June 30, 1985, which decision vacated the OSHA citation in its entirety. *See* attached Appendix C.

With respect to the alleged violation of Section 5(a)(1), the "general duty clause" of the Act, the ALJ stated that it was questionable whether there was sufficient evidence to establish a violation, Appendix C, p. 9, but he found in any case that the general duty clause of the Act was inapplicable to the case, under the Secretary's preemption regulations, because the factual circumstances were governed by specific regulations set forth at 29

C.F.R. § 1910.1000(a)-(e). These regulations state the permissible levels of employee exposure to freon and state the measures an employer must take to remain within such limits. 29 C.F.R. § 1910.1000(a) (the "freon standard") provides that employers must not expose employees to a time-weighted average of more than one thousand parts per million of freon vapors during any eight hour work shift of a forty-hour work week. *See* Appendix B.

In support of his conclusion that the general duty clause was preempted by the more specific regulations governing employee exposure to freon, the ALJ cited (1) the legislative history of the Act, (2) the rule of statutory construction that the "specific takes precedence over the general," and (3) OSHA's preemption regulation contained in 29 C.F.R. § 1910.5(c)(1)[3] as it has been interpreted by the Commission. Appendix C, pp. 9-12.

The ALJ further concluded that the Secretary had not demonstrated that the employee who was allegedly overcome by the fumes of the solvent on September 23, 1983 was exposed by General Dynamics to an amount of solvent in excess of the level permitted under the freon standard and accordingly vacated the citation as to the alleged violations of 29 C.F.R. § 1910.1000(a) and (e). *See* App. C, pp. 21-22.

The Secretary of Labor and the Union petitioned the Commission for review of the ALJ's decision. Because no Commissioner directed an internal review of the decision, the ALJ's Decision became a Final Order of the Commission pursuant to 29 U.S.C. § 661(j). *See* Appendix D. The Union filed a Petition for Review with the United States Court of Appeals for the District of Columbia Circuit. The Secretary of Labor first sought review with the United States Court of Appeals for the Eighth Circuit, but his Petition was transferred to the Court of Appeals for the

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[3] 29 C.F.R. § 1910.5(c)(1) provides in relevant part:

> If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process . . .

District of Columbia Circuit and consolidated with the Petition of the Union.

Neither the Secretary of Labor nor the Union contested (in the Court of Appeals) the Commission and the ALJ's ruling that General Dynamics did not violate the freon standard set out at 29 C.F.R. § 1910.1000(a) or the control requirements set forth in 29 C.F.R. § 1910.1000(e). Rather, they argued that the ALJ and the Commission had erred in vacating the citation regarding the alleged breach of the general duty clause of the Act on the basis that Sections 1000(a)-(e), under 29 C.F.R. § 1910.5(f),[4] did not "cover" the hazard in question and thus that such regulations did not preempt the general duty clause.

On April 14, 1987, the Court of Appeals issued a unanimous decision granting both petitions for review and vacating that part of the Commission's Final Order dismissing the general duty clause citation against General Dynamics. The Court of Appeals acknowledged in its opinion that no party in the case had challenged the rule adopted in 29 C.F.R. § 1910.5(f) that an employer who is in compliance with a specific safety or health standard or regulation for a particular hazard "shall be deemed" to be in compliance with the general duty clause of the Act as to such hazard. *See* Appendix E, pp. 9-10. Nonetheless, the Court of Appeals, *sua sponte*, struck down Regulation 1910.5(f), "conclud[ing] that the Act does not empower the Secretary, and hence OSHA, to absolve employers who observe specific standards from duties otherwise imposed on them by the general duty clause." Appendix E, p. 13. In the place of Regulation 1910.5(f), the Court of Appeals created a rule that it found to be more in accord with the statute, namely that preemption of the general

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[4]29 C.F.R. § 1910.5(f) provides:

> An employer who is in compliance with any standard in this part *shall be deemed* to be in compliance with the requirements of Section 5(a)(1) of the Act [the general duty clause], but only to the extent of the condition, practice, means, method, operation, or process covered by the standard.
>
> (emphasis and bracketed material added)

duty clause occurs only when the employer does not "know" that the specific standard is inadequate. App. E, pp. 15-16.

The Court of Appeals also concluded that the final Order of the Commission was arbitrary and capricious in that it failed to distinguish adequately the instant case from an allegedly contrary ruling by the Commission in *Con Agra, Inc., McMillan Company Division*, 1983 C.C.H. O.S.H.D., ¶ 26,420, p. 33,523, 11 OSHC (BNA) 1141. *See* Appendix E, pp. 18-19.

REASONS FOR GRANTING THE WRIT

A brief summary of the reasons on the basis of which General Dynamics contends Certiorari should issue is offered at this point. This case is appropriate for consideration by this Court for two reasons. First, this case is of great public importance because it concerns the issue of whether the Court of Appeals may strike down and effectively replace with its own regulation a regulation of long standing promulgated by the Secretary of Labor stating a preemption rule regarding citations under the "general duty clause" of the Occupational Safety and Health Act ("OSHA" or the "Act"), 29 U.S.C. § 654(a)(1), where the Secretary's regulation is a reasonable construction of the Act. The OSHA regulation in question, set out at 29 C.F.R. § 1910.5(f), provides:

> An employer who is in compliance with any standard in this part *shall be deemed* to be in compliance with the requirements of Section 5(a)(1) of the Act, but only to the extent of the condition, practice, means, method, operation, or process covered by the standard.

(emphasis added)

On April 14, 1987, the Court of Appeals, *upon the request of no party*, struck down such regulation, "conclud[ing] that the Act does not empower the Secretary, and hence OSHA, to absolve employers who observe specific standards from duties otherwise imposed on them by the general duty clause." Opinion, p. 13.

OSHA, however, the federal agency empowered with enforcement of the Act, has reached the interpretative conclusion set out in its preemption regulation, 29 C.F.R. § 1910.5(f), *supra*. Given this fact, a court may not encroach upon the authority of the agency and strike down and replace its regulation merely because that court does not agree with the agency's interpretation of the statute. *See Udall v. Tallman*, 380 U.S. 1, 16, 13 L.Ed. 2d 616, 85 S. Ct. 792, (1965); *Environmental Protection Agency v. National Crushed Stone Assn*, 449 U.S. 64, 84, 66 L.Ed. 2d 268,

101 S. Ct. 295 (1980); *Johnson v. Robison*, 415 U.S. 361, 369, 39 L.Ed. 2d 389, 94 S. Ct. 1160 (1974); *American Maritime Assn v. U.S.*, 766 F.2d 545, 560 (D.C. Cir. 1985); *Conference of State Bank Supervisors v. Conover*, 715 F.2d 604, 623 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 927, 80 L.Ed. 2d 181, 104 S. Ct. 1708 (1984); *Washington Assn for Television and Children v. F.C.C.*, 712 F.2d 677, 684 (D.C. Cir. 1983). Indeed, a reviewing court *must* defer to reasonable statutory interpretations by the Agency that is empowered to apply the Act, even if the court would not adopt such interpretations itself. *Udall*, *supra*, 380 U.S. at 16.

A second reason that consideration by this Court is appropriate is that the decision of the Court of Appeals to strike down Regulation 1910.5(f) conflicts with the position taken by the Secretary of Labor (the party that drafted the regulation struck down by the Court of Appeals), the Occupational Safety and Health Review Commission, the Administrative Law Judge, the Union, General Dynamics, and every court and Review Commission decision on this issue of general duty clause preemption, all such entities and decisions having respected and applied the rule set out in Section 1910.5(f) as a reasonable interpretation of Congressional intent when Congress enacted 29 U.S.C. § 654(a). *See, e.g., Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902 (2d Cir. 1977) ("superior notice" through specific standards "instead" of general duty clause); *Brennan v. Butler Lime & Cement Co.*, 520 F.2d 1011, 1017 n.9 (7th Cir. 1975); *National Realty and Construction Company v. Occupational Safety and Health Review Commission*, 489 F.2d 1257, 1261 and n.9 (D.C. Cir. 1973); *Con Agra, Inc., McMillan Company Division*, 1983-84 O.S.H. Dec. (C.C.H.) ¶ 26,420, at 33,523, 11 OSHC (BNA) 1141 (1983); *Sherwood Medical Indus., Inc.*, 9 O.S.H. Cas. (B.N.A.) 1405, 1406 (ALJ 1981) (Section 1910.1000 limits); *Phelps Dodge Corp., Morenci Branch*, 9 O.S.H. Cas. (B.N.A.) 1222, 1223 (ALJ 1980) (same); *Tom's River Chemical Corp.*, 1978 O.S.H. Dec. (C.C.H.) ¶ 23,122 (ALJ 1978) (same); *A. Prokosch and Sons Sheet Metal, Inc.*, 8 O.S.H. Cas. (B.N.A.) 2077, 2079 (Review Commission 1980); *Ted Wilkerson, Inc.*,

1981 O.S.H.D. ¶ 25,551, p. 31,855; *Sun Ship Building and Dry Dock*, 1973 O.S.H.D. ¶ 16,725, at p. 21,474; *Secretary's Initial Brief* to the Court of Appeals, p. 27; *Secretary's Reply Brief*, p. 2; *Union's Brief*, p. 22; General Dynamics' Brief, p. 39; Administrative Law Judge's Decision, Appendix C.

These arguments are discussed in detail *infra*, as is the Court of Appeals's conclusion that the *Con Agra* decision, *supra*, was not properly considered by the ALJ and Commission.

I.

THE COURT OF APPEALS'S DECISION IMPROPERLY ENCROACHES UPON OSHA'S AUTHORITY TO INTERPRET THE ACT.

Petitioner respectfully contends that the Court of Appeals has committed a grievous error. Left undisturbed, this decision will render nugatory the preemption regulation promulgated by the Secretary of Labor governing this dispute and thousands of other similar present and future cases, a holding that will constitute an improper judicial encroachment upon an administrative agency's authority and interpretative function.

Section 5(a) of the Occupational Safety and Health Act, 29 U.S.C. § 654(a), provides:

> Each employer —
>
> (1) shall furnish to each of its employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employment;
>
> (2) shall comply with the Occupational Safety and Health standards promulgated under this chapter.

After OSHA was enacted, the Secretary of Labor promulgated a regulation, set out at 29 C.F.R. § 1910.5(f), stating the rule with respect to circumstances in which an employer might arguably be subject to citation under both the Act's "general duty clause," Section 5(a)(1), *supra*, and a specific standard promulgated pursuant to Section 5(a)(2) of the Act, *supra*. This Regulation provides as follows:

> An employer who is in compliance with any standard in this part *shall be deemed to be in compliance* with the requirements of section 5(a)(1) of the Act, but only to the extent of the condition, practice, means, method, operation, or process covered by the standard.

29 C.F.R. § 1910.5(f) (emphasis added).

There is no dispute that the *issue* addressed by Regulation 1910.5(f) is whether the general duty clause is applicable to cases where a specific standard has been promulgated to address the hazard in question.[5] This issue was long ago resolved in Review Commission adjudications and by the Secretary's preemption Regulation, set out in Section 1910.5(f), by the rule that compliance with a specific standard, where that specific standard addresses the hazard in question, is deemed to be compliance with Section 5(a)(1) of the Act. This issue now, however, according to the Court of Appeals, should be resolved by the rule developed

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[5]For example, in this case, the *only* issue below was whether the regulations set out at 29 C.F.R. § 1910.1000(a) and (e) "covered" (*see* Section 1910.5(f)) the risk of exposure to freon in an M-1 Tank under construction. The Secretary and the Union agreed with General Dynamics that if such regulations *did* cover the risk, the general duty clause was preempted. *See* all Briefs of all parties to the Court of Appeals.

For the Court's information, Section 1910.1000 of the OSHA regulations sets out a detailed scheme establishing safety requirements relating to employee exposure to the substance at issue here, freon, and many other substances. *See* Appendix B. Sections 1910.1000(a)-(d) distinguish very carefully among the treatments accorded to different substances. All of the substances included in this regulation, including freon, are subject to "eight hour time weighted exposure" limits. The eight hour weighted exposure limit for freon is one thousand parts per million, under a formula set out in the regulation. Other substances have different quantitative limits. Moreover, other substances are subject to shorter term elevated exposure limits. Still others are subject to "maximum peak" limits not to be exceeded at *any* time, even though the eight hour weighted exposure might remain within the average. The regulation specifically states, however, that exposure above the average at a point or points in time is permissible for substances such as *freon* so long as the eight hour time weighted average is not violated. *See* 29 C.F.R. 1910.1000(d)(1)(ii). Unlike other substances, no "peak" limit is established for freon. *Id.* 29 C.F.R. 1910.1000(*e*), establishing a basis for separate citable violations, affirmatively obligates the employer to take specific physical steps to contain exposure to freon within safe limits. This section *mandates* "engineering controls," "administrative controls," "protective equipment," and any and all other "protective measures" necessary to maintain safe exposure levels, "whatever the circumstances or the nature of the employer's operation." *Todd's Ship Yard Corp.*, 1981 C.C.H. O.S.H.D. ¶ 25,516, p. 31,812.

On the basis of the coverage of Regulations 1910.1000(a) and (e), the Commission concluded that the general duty clause was preempted. App. C., p. 12.

sua sponte by that court in the instant case, namely that if an

> employer *knows* a particular safety standard is inadequate to protect his workers against a specific hazard it is intended to address, or that the conditions in his place of employment are such that the safety standard will not adequately deal with the hazards to which his employees are exposed, he has a duty under section 5(a)(1) to take what ever measures may be required by the Act, over and above those mandated by the safety standard, to safeguard his workers . . . *Scienter is the key.*
>
> By the same token, *absent* such knowledge, an employer may rely on his compliance with a safety standard to absolve him from liability from any injury actually suffered by an employee as a consequence of a hazard the standard was intended to address, and he will be deemed to have met his obligation under the general duty clause with respect thereto. *In other words, compliance with a safety standard will not relieve an employer of his duty under section 5(a)(1); rather it satisfies* that duty.

Opinion of the Court of Appeals, Appendix E, pp. 15-16 (emphasis added).

Until now, the rule set out in the Secretary's preemption regulation, Section 1910.5(f), has received the respect and deference of every judicial and administrative body considering such regulation, and *every party*, without exception, in this case. *See, e.g., Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902 (2d Cir. 1977) ("superior notice" through specific standards "instead" of general duty clause); *Brennan v. Butler Lime & Cement Co.*, 520 F.2d 1011, 1017 n.9 (7th Cir. 1975); *National Realty and Construction Company v. Occupational Safety and Health Review Commission*, 489 F.2d 1257, 1261 and n.9 (D.C. Cir. 1973); *Con Agra, Inc., McMillan Company Division, 1983-84 O.S.H. Dec. (C.C.H.) 26,420, at 33,523, 11 OSHC (BNA) 1141; Sherwood Medical Indus., Inc.*, 9 O.S.H. Cas. (B.N.A.) 1405, 1406 (ALJ 1981) (Section 1910.1000 limits); *Phelps Dodge Corp.*,

Morenci Branch, 9 O.S.H. Cas. (B.N.A.) 1222, 1223 (ALJ 1980) (same); *Tom's River Chemical Corp*, 1978 O.S.H. Dec. (C.C.H.) ¶ 23, 122 (ALJ 1978) (same); *A. Prokosch and Sons Sheet Metal, Inc.*, 8 O.S.H. Cas. (B.N.A.) 2077, 2079 (Review Commission 1980); *Ted Wilkerson, Inc.*, 1981 O.S.H.D. ¶ 25,551, p. 31,855; *Sun Ship Building and Dry Dock*, 1973 O.S.H.D. ¶ 16,725, at p. 21,474; *Secretary's Initial Brief* to the Court of Appeals, p. 27; *Secretary's Reply Brief*, p. 2, *Union's Brief*, p. 22; Administrative Law Judge's Decision, Appendix C.

Nonetheless, the Secretary's preemption regulation was rejected and struck down by the Court of Appeals on the basis that the "the *clear and unambiguous*" language of the Act precluded such a preemption rule. App. E, p. 13, pp. 11-12. The court concluded that, rather than the preemption rule stated in Regulation 1910.5(f), the proper rule was that "compliance with a safety standard will not relieve an employer of his duty under section 5(a)(1); rather, it satisfies that duty," "*scienter*" being "the key." Appendix E, p. 15-16. (emphasis added) (see full quotation *supra*).

General Dynamics respectfully contends that it is certainly not apparent from the language of the statute that the court's newly created rule of preemption based on "knowledge," "relief," and "satisfaction" is a preferable construction of the statute. But even this contention would miss the essential point in this case:

> When faced with a problem of statutory construction, this Court shows *great deference* to the interpretation given the statute by the *officers or agency charged with its administration.*

Environmental Protection Agency v. Nat'l Crushed Stone Assn., 449 U.S. 64, 84 (1980) (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)) (emphasis added); *accord Johnson v. Robison*, 415 U.S. 361, 369 (1974); *American Maritime Assn v. United States*, 766 F.2d 545, 560 (D.C. Cir. 1985); *Washington Association for Television and Children v. F.C.C.*, 712 F.2d 677, 684 (D.C. Cir. 1983). This is an appropriate case for such judicial deference,

OSHA having been given the authority to interpret and apply the statute.

The Court of Appeals's conclusion that the intent of Congress is *clear* from the language of OSHA to preclude preemption of the general duty clause by specific regulations, App. E, pp. 11-12, is, General Dynamics respectfully submits, simply unfounded. While General Dynamics concedes that the presence of preclusive language in the Act prohibiting preemption of the general duty clause by a specific regulation *would* cause Section 1910.5(f) to be an impermissible interpretation of the statute, the Act in question here contains no such language. Although the Court of Appeals suggests that to find ambiguity in the statute on this issue would be akin to finding an ambiguity in a "No Smoking" sign, App. E at 11, General Dynamics contends that, upon examination of the statute, this Court should observe that the Act, far from clearly requiring the new "scienter" rule announced by the Court of Appeals, does not even suggest such a result.

In fact, a fair reading of Section 5(a) of the Act, 29 U.S.C. § 654(a), leads to the conclusion that there is a tension between Section 5(a)(1) and Section 5(a)(2) of the Act, and that an obvious *unresolved issue on the face of these provisions* is presented, namely, which subsection governs in circumstances in which either might conceivably apply. Specifically, that issue is whether the employer must comply with the general duty clause where compliance with a specific, promulgated standard under Section 5(a)(2) would entail different behavior. Doubtless the Secretary of Labor in promulgating Regulation 1910.5(f) recognized that under the language of OSHA such an issue arose. It must be asked what statutory language the court below has concluded "*clearly*" resolves this issue.

At best, it could be said for the Court of Appeals's "scienter" interpretation that its view is one of "two arguably reasonable interpretations of one statutory provision." *See Conference of State Bank Supervisors v. Conover*, 715 F.2d 604, 623 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 927, 80 L.Ed. 2d 181, 104 S. Ct.

1708 (1984). Given this fact, absent contrary legislative history, it was the *duty* of the Court of Appeals to accept the Agency's interpretation over its own, it "not (being) necessary for a court to find that the agency's construction is the *only* reasonable one or even the reading the *court* would have reached if the question initially had arisen in a judicial proceeding." *Federal Election Comm'n v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981) (emphasis added); *accord Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Conover, supra*, at 623. As this Court noted in *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315, 77 L.Ed. 796, 53 S. Ct. 350, (1933),

> [t]he practice has peculiar weight when it involves a contemporaneous construction of a statute by the *men charged with the responsibility of setting its machinery in motion*, of making the parts work efficiently and smoothly while they are yet untried and new.

Accord Udall v. Tallman, 380 U.S. 1, 16 (1965); *Federal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84, 90, 3 L.Ed. 2d 132, 79 S. Ct. 141 (1958); *United States v. American Trucking Association*, 310 U.S. 534, 549, 84 L.Ed. 1345, 60 S. Ct. 1059 (1940). As noted above, the interpretation of the Agency here, OSHA, is set out in Regulation 1910.5(f).

The Court of Appeals's error in finding the Act "clear" on its face is critical because the legislative history of the general duty clause (which the Court of Appeals stated it need not consider *because* it found the statute clear, App. E, p. 11) is replete with evidence (cited by General Dynamics to the Court of Appeals) that the clause was intended by Congress to be preempted where a specific standard addressed the hazard in question. *See, e.g., Report of the Conference Committee*, H.R. Rep. No. 91-1765, 91st Congress, 2d Sess., 1970, p. 22, reprinted in *Legislative History of the Occupational Safety and Health Act of 1970*, 92nd Congress, lst Sess. (Committee Print 1971), p. 852 (the general duty clause was intended to protect "employees who are working under such *unique* circumstances that *no standard has yet been enacted* to cover the situation" (emphasis in original)); *Report of*

the Senate Labor and Public Welfare Committee, Senate Report No.1282, 91st Congress, 2d Sess., 1970, p. 10, reprinted in *Legislative History*, *supra*, at 150 ("[t]he general duty clause . . . would simply enable the Secretary to insure the protection of the employees who are working under *special circumstances* for which *no standard* has yet been adopted"); *Legislative History*, *supra* note 27, at 1217 (remarks of Representative Stieger) ("[i]t is expected that the general duty requirement will be relied upon *infrequently* and that primary reliance will be placed on specific standards which will be promulgated under the Act"); *see also* D. Morgan and M. Duvall, *OSHA's General Duty Clause: An Analysis of Its Use and Abuse*, 5 *Industrial Relations Law Journal* 283, 288, 297 and n.79, 298 (1983). The Court of Appeals's interpretation of the Act is thus clearly contrary to the intention of Congress in enacting OSHA. As a result, should this Court conclude that Section 5(a) of the Act does *not* "clearly" require that the general duty clause apply even where a standard has been promulgated, the Secretary's view, set out in Regulation 1910.5(f) and *consistent* with Congressional intent, must prevail.

There is no indication whatsoever in the legislative history, of which General Dynamics is aware, that suggests that Congress ever intended the rule precluding preemption in cases of actual knowledge or scienter created by the Court of Appeals in its decision here. As noted by the Review Commission in 1973,

> [c]iting a respondent under the *general duty requirement of the Act is not appropriate* where there exists *a specific occupational safety and health standard covering* the conduct at issue . . . ***This principle was recognized by Congress in the passage of the general duty requirement.*** The report of the Senate Labor and Public Welfare Committee explains the purpose of Section 5(a)(1) and its relationship to the specific standards:
>
> > "The *general duty clause* in this Bill *would not be a general substitute* for reliance on standards, but would simply enable the Secretary to insure the protection of

> employees who are working under special circumstances for which no standard has yet been adopted."
>
> Thus, where any occupational safety and health standard has been promulgated under the authority of Section 6 of the Act, which regulates a specific type of conduct, the complainant *must* cite all alleged failures to comply with such conduct under that particular standard, *rather than* the general duty clause.
>
> Congress delegated full responsibility for the promulgation of occupational safety and health standards to the complainant. It enacted Section 5(a)(1) *only* to cover those situations which might not be treated by a standard promulgated by the complainant.

Sun Ship Building and Drydock Co., 1973 OSHD ¶ 16,725, p. 21, 474 (Rev. Comm'n 1973) (footnote omitted; emphasis added).

This view is sensible because the specific "standards presumably give the employer superior notice of the alleged violation . . ." *Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 905 n.5 (2d Cir. 1977). (Of course, a rule such as the Court of Appeals's new "scienter" rule, disregarding the advantages of the specificity and objectivity of the particularized regulations issued under Section 5(a)(2) of the Act, provides no such superior notice.)

Moreover, because, as noted above, it has been the *consistent* position, over the years and throughout this case, of the Secretary and the Review Commission (as well as that of the other parties in this case, the Union and General Dynamics), *see* citations *supra*, that the general duty clause is preempted where a specific standard addresses the hazard in question, deference to the Secretary and Commission's view is "enhanced." *See Washington Association for Television and Children v. F.C.C.*, 712 F.2d 677, 684 (1983). As this Court noted in *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315 (1933),

> [t]rue indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True it also is that administrative practice, *consistent and generally unchallenged*, will not be overturned except for very *cogent reasons* if the scope of the command is indefinite and doubtful. *United States v. Moore*, 95 U.S. 760, 763; *Logan v. Davis*, 233 U.S. 613, 627; *Brewster v. Gage*, 280 U.S. 327, 336; *Fawcus Machine Co. v. United States*, 282 U.S. 375; *Interstate Commerce Commn. v. N.Y., N.H. & H.R. Co.*, 287 [U.S.] 178.

For this reason, the Court of Appeals's decision is even more startling.

Nor does the Review Commission's decision in *Con Agra*, *supra*, support in any sense the Court of Appeals's creation of an actual knowledge "scienter" preemption rule. *See* Opinion, p. 15 (citing *Con Agra*). The Court of Appeals's opinion emphasizes *Con Agra* in the context of the "larger point that when an employer is aware of a hazard that is not in fact addressed by a specific standard, then of necessity that standard cannot be deemed to have preempted his obligation under the general duty clause." App. E, p. 19. The Review Commission in *Con Agra*, however, specifically endorsed the concept set out in Section 1910.5(f) that the general duty clause is preempted where a specific standard exists to address the hazard in question:

> We note that the *purpose* of the general duty clause is to provide protection against recognized hazards *where no duty under a specific standard exists*, and that specific promulgated standards *will preempt* the general duty clause, but only with respect to hazards, conditions or practices expressly covered by the specific standards. *National Realty and Construction Company v. OSHRC*, 489 F.2d 1257, 1258, n.9 (D.C. Cir. 1973).

Con Agra, 1983 OSHD at p. 33,527 (emphasis added; many other citations omitted). Thus, the issue in *Con Agra*, as it was in this case before the Court of Appeals's decision, was whether the

specific standard actually *covered* the hazard in question and hence preempted the general duty clause, not whether, assuming the employer *knew* the standard was inadequate, the employer had an obligation under the general duty clause.

As a whole, it should be concluded that the Court of Appeals exceeded its authority by striking down regulation 1910.5(f) and then effectively creating its own regulation to replace that of the agency. The issue in this case now is thus not whether a hazard that the employer knows to be inadequately addressed by a specific standard may be the object of a general duty clause citation, but rather whether the Court of Appeals may encroach upon the previously promulgated judgment of OSHA that regulation of certain hazards pursuant to the general duty clause is preempted where there are specific standards that address such hazards. If the Court of Appeals disagreed with such agency judgment, it should have suggested modification *by the Agency* of the specific standards to effect more stringent future regulation of the hazard at issue, rather than effect improper and unintended application of the general duty clause. *See, e.g., A. Prokosch & Sons Sheet Metal, Inc.*, 8 O.S.H. Cas. (B.N.A.) 2077, 2081 (Rev. Comm'n 1980); *Donovan v. A.A. Biero Constr. Co.*, 746 F.2d 894, 905 (D.C. Cir. 1984) ("The Secretary is always free to promulgate new standards or interpretative rules to clarify existing standards").

II.

CON AGRA WAS PROPERLY CONSIDERED, APPLIED, AND FACTUALLY DISTINGUISHED BY THE COMMISSION.

The Court of Appeals found that the Commission had failed to distinguish the decision of the Commission in *Con Agra, Inc., McMillan Company Division*, 1983 C.C.H. O.S.H.D., ¶ 26,420, p. 33,523, 11 OSHC (BNA) 1141. *See* App. E, pp. 17-19. The decision of the Administrative Law Judge here, and the decision of the Commission to reject the Secretary and the Union's contentions regarding *Con Agra*, however, are perfectly consistent with the Commission's earlier decision in *Con Agra*.

The Administrative Law Judge here carefully considered and applied the *Con Agra* decision, finding, *inter alia*, that regulations 1910.1000(a)(2) and 1910.1000(e) together do address the hazard at issue in this case and thus preempt the general duty clause.[6] In his discussion regarding preemption of the general duty clause, the Administrative Law Judge explicitly considered *Con Agra* as follows:

> In support of its position that 5(a)(1) is proper in this case, Complainant cites the Commission decision in *Con Agra, Inc.*, 83 OSHRC, 5/C7, 11 BNA OSHC 1141, 1145, 1983-84 CCH OSHD ¶ 26,764 (No. 79-1146, 1983), where it is stated:
>
> > The failure to test in a confined atmosphere before possible exposure of employees to toxic substances is a violation distinct from continued exposure to known quantities of substances listed in 1910.1000.

---

[6] The cases cited by the Commission in *Con Agra*, *see Con Agra*, p. 33,527, state that various hazards, if left uncorrected, constitute Section 5(a)(1) general duty clause violations. None of these cases, however, establishes that Section 5(a)(1) may be applied where a specific standard addresses the hazard in question. Indeed, *Con Agra* states precisely the contrary. *See supra*.

The foregoing exception is not applicable to the facts in this case because of the procedure followed by Paling in ventilating the atmosphere, and that the air contaminants standard deals fully and completely with the hazard at issue, which is employee use of tricholo trifluoroethane in production of the M-1 tank. Also, in *Con Agra, supra*, the Commission did not deviate from its precedent by again stating:

> We note that the purpose of the general duty clause is to provide protection against recognized hazards where no duty under a specific standard exists, and *that specific promulgated standards will preempt the general duty clause*, but only with respect to hazards, conditions, or practices expressly covered by the specific standard . . . .

Clearly, the circumstances of this case are governed solely by the regulations at 29 CFR § 1910.1000 (a)-(d) which set forth the limits of employee exposure to tricholoro trifluoroethane. Protection is provided in *any* potential hazards associated with employee use of the solvent by specifically prescribed levels within which the employee may safely work. *In addition*, the employer is specifically notified of the *manner* in *which abatement is to be accomplished by* 1910.1000(*e*), *which requires* . . .

> *administrative controls, engineering controls, personal protective equipment or, "any other protective measures"* . . . the employer must use one or more of the specified measures to assure *full protection* for the employees, *whatever the circumstances or the nature of the employer's operation* . . .

The decision in this case recognizes that specific standards "are intended to be the primary method of achieving the policies of the Act . . ." And further, "the standards presumably give the employer superior notice of the alleged violation and should be used instead of the general duty clause whenever possible." . . . Necessarily, the employer has a legal obligation to comply with safety regulations

specifically promulgated to accomplish the stated purpose of the Act.

App. C, pp. 11-12.

This discussion by the Administrative Law Judge was quite sensible in light of the circumstances of *this* case. As was emphasized by the Judge, the present case involves the application of not only the quantitative requirements of Section 1000(a)(2), but also of the qualitative requirements of Section 1000(*e*), which section ***mandates*** all necessary and effective means to achieve full compliance with the standards set out in Section 1000(a)(2). *See* 29 C.F.R. § 1910.1000(e).

Con Agra, however, did not consider the impact of Section 1000(e) (perhaps because, unlike the present case, where General Dynamics was cited under 1000(e), the employer in *Con Agra* had not been so cited). Where a decision does not consider an issue, it cannot be considered precedent on such issue. *See United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 38, 97 L.Ed. 54, 73 S. Ct. 67, 69 (1952); *Webster v. Fall*, 266 U.S. 507, 511, 69 L.Ed. 411, 45 S. Ct. 148, 149 (1925); *Illinois State Board of Education v. Socialist Workers*, 440 U.S. 173, 184, 59 L.Ed. 2d 230, 99 S. Ct. 983, 989 (1979). In this case, because the impact of the mandate of Section 1000(e), as described above, was not considered in the *Con Agra* decision, *Con Agra* cannot be precedent with regard to the issue of the applicability and significance of Section 1000(e). Therefore, *Con Agra* did not in any manner require that Section 5(a)(1) of the Act not be preempted with respect to the hazard at issue here, and the ALJ's emphasis of Section 1000(e) in distinguishing *Con Agra* was quite reasonable. Indeed, it is the presence of the controls obligation of Section 1000(e) that is the most substantial basis of the ALJ's logical conclusion that the general duty clause is inapplicable here.

The Court of Appeals has understated the significance of Section 1000(e) of the regulations. *See* App. E, pp. 18-19. As the Administrative Law Judge stated (*see* App. C, p. 12), Section 1000(e) requires controls and equipment sufficient to assure full

protection of employees to the degree specified in Section 1000(a), "*whatever* the circumstances or the nature of the employer's operation." (quoting *Todd's Shipyards Corp.*, 81 O.S.H.A.R.C. 69/A2, 9 B.N.A. O.S.H.C. 2031, 2034, 1981 C.C.H. O.S.H.D. ¶ 25,516 at p. 31,812 (No. 77-2545, Review Comm. 1981) (emphasis added)). On this basis (which *Con Agra* did not consider, as well as others, *see* General Dynamics' Brief to the Court of Appeals, pp. 64-72), the ALJ explained his decision as to preemption of the general duty clause. App. C, p. 12. General Dynamics respectfully contends that the Court of Appeals failed to recognize that Section 1000(e) requires each and every means necessary to address the hazard alleged by the Secretary in this case. Section 1000(e) itself requires that the employer address, by ventilation and/or other means, the conditions *here alleged*, if such conditions would cause violation of the limits established in Section 1000(a).

Indeed, the *Secretary* has contended *in this case* that the very controls General Dynamics was cited for not implementing under the general duty clause are *already* required under Section 1000(*e*). The Secretary's post trial Brief to the Administrative Law Judge in this case states as follows:

> Tank repairman Paling's overexposure and serious injury resulted from a failure of respondent to implement feasible administrative or *engineering controls* to prevent or reduce said exposure in violation of 29 C.F.R. 1910.1000(*e*). In light of the *confined space nature* of the MI Abrams tank, the appropriate control would have been for respondent to have implemented *confined space entry procedures* to address this overexposure hazard and the potential chemical poisoning and oxygen deficiency hazards associated with confined space entry as heretofore previously discussed.

(D.C. Circuit Appendix (hereinafter "A"), pp. 107C, 107D) (pp. 89-90 of Secretary's Post Trial Brief) (emphasis added) Thus, the Commission and General Dynamics are making the point that the conceded requirement under Section 1000(e) that *all* of the controls, the lack of which the Secretary contends was a

violation of the general duty clause, were *already required* under Section 1000(e), in the event that the failure to adopt such controls would result in a violation of Section 1000(a). Because Section 1000(e) applies, "whatever the circumstances or the nature of the employer's operation," *Todd's Ship Yards, supra*, Section 1000(e), in combination with Section 1000(a), completely regulates and covers both the circumstances of quantitative overexposure to freon and the measures necessary to prevent such overexposure.

For example, as conceded by the Secretary, *see* quotation of Brief *supra*, an employer might, if a "confined space" were involved, be cited for not adopting a confined space entry procedure under Section 1000(e). If there is a greater risk within a confined space that overexposure could occur, the employer *must*, under Section 1000(e), take protective measures to abate the hazard. As a result, the rule that compliance with Sections 1000(a) and 1000(e) is deemed to be compliance with the general duty clause, Section 1910.5(f), is not only an interpretation of OSHA entitled to respect generally, but it is also quite sensible. As a test of this proposition, this Court might inquire what control implementable to address the hazard alleged in this case is not already required (and thus the proper subject of an OSHA citation), if necessary to abate the hazard, under Section 1000(e). If the answer is "none," the case for preemption of the general duty clause is complete and unrebuttable.

The Court of Appeals rejected this basis of the ALJ's distinction between the present case and *Con Agra*, stating that it was not "*persuaded* by the Commission's argument that this case is distinguishable from *Con Agra* because subsection *1910.1000(e)* of the regulations adequately addresses the special measures required to safeguard employees working in confined spaces." App. E, p. 18 (emphasis added). The court noted that section 1000(e) requires only measures to achieve compliance with the quantitative limits in section 1000(a). App. E, pp. 18-19. The Court of Appeals may thus have concluded that the quantitative requirements of Section 1000(a) are themselves

inadequate to address an allegedly "known" risk that exposure *within* the time weighted freon limit might be unsafe, and hence that the general duty clause *should* apply. If the Court of Appeals has so concluded, however, it has adopted an interpretation of the Act at odds with the at least equally reasonable interpretation of OSHA, which has, in its preemption regulation set out in Section 1910.5(f), long since decided this issue in favor of preemption. It was not for the Court of Appeals to impose its own preference.

Moreover, *Con Agra* is distinguishable from the present circumstances because, in the present case, the substance in an M-1 tank that would pose a potential risk to the employee is *known*. It is known because it is introduced by the employees themselves. The Commission in *Con Agra* emphasized the fact that the relevant employees were required to enter train cars not knowing what, if any, substances might be inside. 1983 OSHD at 33,526. Thus, the risk (posed by "the failure to *test*," *see* ALJ's quotation of *Con Agra, supra*) in *Con Agra* was different from the risk here, where the substance is both known[7] and subject to specific regulations. (Of course, the employer has an obligation to determine the quantity of exposure, if such is necessary to comply with the safety provisions of Section 1000(a)(2).)

Additionally, as the Administrative Law Judge concluded, the inside of an M-1 tank under construction is not a confined space for which special entry procedures are required. App. C, p. 9. *Con Agra* is thus inapplicable by its very terms. *See* ALJ's quotation of *Con Agra, supra*. The Administrative Law Judge found specifically that the

> record indicates . . . that the basic criteria for identifying a *confined space* requiring safe entry procedures *is the extent of enclosure and inadequacy of natural ventilation to purge the atmosphere*. In the instant case, Mr. Paling testified that the *[3] hatches and drains were open* when he ventilated the space for up to an hour as part of his normal procedure. The

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[7]In this case, the Secretary concedes that the hazard relates to "freon." *See Brief of Secretary* to Court of Appeals, p. 21; *see also* Citation, App. A.

> conditions under which he worked suggest safe operating procedures were being employed which included purging of the atmosphere by mechanical ventilation.

App. C, p. 9 (bracketed material and emphasis added). Thus, by virtue of the fact that three hatches and the drains to the tank were open during the procedure, *id.*, p. 23, "natural ventilation" was obtained. In addition, any danger that might have required some entry procedure, even if the M-1 tank were a confined space, was eliminated by the mechanical ventilation procedure. *Id.*, p. 9. Thus, as to the applicability of the *Con Agra* decision, the ALJ found that the "*hazard*" considered in *Con Agra*, an unventilated, closed, and "confined" atmosphere, did not *exist* in the present case. *See* App. C, p. 11 ("The foregoing [*Con Agra*] exception is not applicable to the facts in this case because of the procedure followed by Paling in ventilating the atmosphere . . ."). If the hazard was different, as the ALJ found it was, *see id.*, the ALJ could sensibly conclude that the specific standard covered the "hazard" that was present—"employee use of [freon] in production of the M-1 Tank." *See* same paragraph of ALJ decision, App. C, p. 11.

Moreover, the Administrative Law Judge specifically concluded that "the designated spaces at the plant which were approved by the parties for safe confined entry procedures did not include the M-1 tanks." App. C, p. 22 (finding of fact no. 6). Indeed, the OSHA Compliance Officer who conducted three inspections of the work place before the citation was issued "at no time, advised respondent that employee use of the solvent in the tanks presented a potential hazard." *Id.* at 22 (finding of fact no. 7). These findings of fact by the ALJ are conclusive in light of the substantial evidence in the record supporting them. *See* 29 U.S.C. § 660(a). (*See, e.g.*, (A 184) (TR-98) (before the issuance of the citation in dispute, the local Union never considered the tank a confined space or requested General Dynamics to do so); (A 438, 447) (TR-1344, 1442) (inventory of plant confined spaces did not indicate that an M-1 tank constituted a confined space in either a married or unmarried configuration); (A 249, 252-53,

254-55) (TR-437, 440-441, 442-443) (OSHA Compliance Officer never advised General Dynamics that he believed the tank was a confined space or that there was any potential for hazard inside the tank).)

Indeed, several significant requirements for a determination of the existence of a confined space were simply not satisfied with respect to the M-1 Abrams tank. As the Secretary conceded at page 7 of his Brief to the Court of Appeals, *see* n.6, confined spaces usually have "only a manhole for entry." (citing Section 2.2, A.N.S.I. standard Z 117.1-1977) (A 1299-1311) (Gov. Ex. 35a). Not only are there three exits and additional drains in the M-1 Abrams tank (*see* App. C, p. 23, finding of fact no. 13), but, as noted above, the three exits and the drains in the tank are and were open during the procedure in question. *See* App. C, p. 23, finding of fact no. 13.

Moreover, a tank or other vessel *under construction* cannot constitute a confined space. *See A.N.S.I. Standard* (A 1299-1311); (Gov. Ex. 35a, Section E 2.2 (1)). Further, the M-1 Abrams tank is intended for human occupancy, an intention that under NIOSH and MIOSHA standards takes the M-1 Abrams out of the definition of "confined space." (A 1312-1388, 1429-1444, 280) (Gov. Ex. 35b, 35d, 35e) (TR581). Indeed, the *proposed* OSHA standard not only indicates that an item intended for continuous human occupancy cannot constitute a confined space, but such standard also explains how the phrase, "continuous human occupancy," should be construed:

> 'Confined space' means a tank, vessel, silo, vault, pit, open top space more than four feet, or any other enclosed space *that is not designed for continuous human occupancy* and has one or more of the following characteristics . . . Spaces covered by the standard are those that are *not designed for humans to work in routinely*, e.g., for a regular shift, but which may have to be entered for specific work related purposes.

(A 1389-1428) (Gov. Ex. 35c, Proposed Standard, pp. 3, 16.) Even the Secretary's witness, Mr. Morgan, conceded that under some circumstances, the M-1 tank is continually occupied by General Dynamics employees. (A 280-2) (TR-581-83) Mr. Morgan also agreed that the M-1 tank is undoubtedly intended for continuous human occupancy. (A 282) (TR-647)

Given the above, there was ample support in the record for the Administrative Law Judge's conclusion that the M-1 Abrams tank did not constitute a confined space requiring safe entry procedures. Thus, the ALJ's distinction between *Con Agra*, where such a confined space was found to be present, and the present case was sensible.[8] Indeed, this Court should conclude both that the ultimate decision of the Commission in *Con Agra* is distinguishable from the present circumstances and that the underlying policy in *Con Agra* of preemption where a specific standard applies has been satisfied here, as the Administrative Law Judge found. App. C, pp. 11-12.

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[8]The Court of Appeals's statement that "the issue whether M1 tanks, hulls, and assembly line pits had been ventilated could be relevant to the outcome of a section 5(a)(1) adjudication, but not to whether such an adjudication need be made at all," App. E, p. 19, ignores the fact that ventilation precluded a finding of the same hazard of "confined space" requiring entry procedures necessary (but not sufficient) for an analogy to the holding in *Con Agra*. *See* App. C, p. 11. In any case, contrary to the Court of Appeals's reading of *Con Agra*, that case does *not* make the "larger point," announced by the Court of Appeals, that an employer's "aware[ness]" or scienter is the deciding issue as to preemption of the general duty clause. Rather, the Commission in *Con Agra* explicitly recognized the rule that the general duty clause absolutely does *not* apply where a specific standard exists to address the hazard:

> We note that the *purpose* of the general duty clause is to provide protection against recognized hazards *where no duty under a specific standard exists*, and that specific, promulgated standards *will preempt* the general duty clause, but only with respect to hazards, conditions or practices expressly covered by the specific standards.

1983 CCH O.S.H.D. at 33,527 (emphasis added).

CONCLUSION

For the foregoing reasons, General Dynamics requests that this Court grant its Petition for a Writ of Certiorari, reverse the decision of the United States Court of Appeals for the District of Columbia Circuit, and remand this matter to the Occupational Safety and Health Review Commission for dismissal as originally ordered by the Commission.

Respectfully submitted,

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GENERAL DYNAMICS LAND SYSTEMS, INC.
Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA AND ITS LOCAL 1200
Respondents.

GENERAL DYNAMICS LAND SYSTEMS, INC.
Petitioner,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR AND OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
Respondents.

APPENDIX

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INDEX TO APPENDICES

Appendix		Page
A	U.S. Department of Labor, Occupational Safety and Health Administration, Citation and Notification of Proposed Penalty, November 29, 1983	A-1 — A-7
B	29 Code of Federal Regulations § 1910.1000, (7-1-86 Edition), pp. 653-660	B-1 — B-23
C	Administrative Law Judge's Decision and Order, August 19, 1985	C-1 — C-22
D	Occupational Safety and Health Review Commission's Notice of Final Order, September 24, 1985	D-1
E	United States Court of Appeals for the District of Columbia Circuit Opinion, April 14, 1987	E-1 — E-19
F	United States Court of Appeals for the District of Columbia Circuit Orders, June 18, 1987	F-1 — F-2

APPENDIX A

Appendix A

U.S. DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY AND HEALTH
ADMINISTRATION

CITATION AND NOTIFICATION OF PENALTY
231 W. Lafayette-Rm. 628
Detroit, Michigan 48226
Telephone: (313) 226-6720

CERTIFICATE NO. P-440268-333
1 ISSUANCE DATE: 11/29/83
2 OSHA NUMBER: P5716 285
3 REGION: 05
4 AREA: 1260
5 PAGE: 1 OF 4
6 TYPE OF VIOLATION(S): Willful
7 CITATION NO.: 1

INSPECTION DATE: 9/29/83 thru 11/28/83
INSPECTION SITE: 28251 Van Dyke Road
Warren, MI 48090

TO: General Dynamics—Land Systems Division
P. O. Box 18016
Warren, Michigan 48090
Attn: J. S. Acharya
Plant Manager

THE LAW REQUIRES that a copy of this Citation be posted immediately in a prominent place at or near the location of the violation(s) cited below. The Citation must remain posted until the violations cited below have been corrected, or for 3 working days (excluding weekends and Federal holidays) whichever is longer.

This citation describes violations of the Occupational Safety and Health Act of 1970. The penalty(ies) listed below are based on these violations. (You must correct the violations referred to in this citation by the dates listed below and pay the penalties proposed, unless within 15 working days excluding weekends and

Federal holidays) from your receipt of this citation and penalty you mail a notice of contest to the U.S. Department of Labor Area Office at the address shown above. (See the enclosed booklet which outlines your responsibilities and courses of action and should be read in conjunction with this form.)

ITEM NUMBER STANDARD, REGULATION OR SECTION OF THE ACT VIOLATED; DESCRIPTION	DATE BY WHICH VIOLATION MUST BE CORRECTED	PENALTY
The issuance of this citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Review Commission.		
The violations described in this citation are alleged to have occurred on or about the day the inspection was made unless otherwise indicated within the description given below:		
1 Public Law 91-596 Section 5(a)(1): The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that: Employees working in the Heavy Repair, Test and Adjust, Marriage, M-1 Hull Line, and Engine Test areas were required to spray or pour varying quantities of 1,1,2 trichloro 1,2,2 trifluoroethane into the turret, driver's, and engine compartments of M-1 tanks and immediately enter these compartments to perform clean-up and other routine tasks thereby exposing themselves to the hazard of asphyxiation and/or chemical poisoning. A confined space entry procedure, specific for these operations, had not been imple-	1/11/84	$9,000

Appendix A

ITEM NUMBER STANDARD, REGULATION OR SECTION OF THE ACT VIOLATED; DESCRIPTION	DATE BY WHICH VIOLATION MUST BE CORRECTED	PENALTY

mented when toxic compounds were introduced into the vehicles. The procedure shall include at least the following:

(1) Written procedures covering a permit system, ventilation, atmospheric testing, rescue procedures, and employee training.

(2) The completion and posting of a confined space entry permit which requires authorization and approval in writing that specifies the location and type of work to be done and certifies that all existing hazards have been evaluated by a qualified person and necessary protective measures have been taken to insure the safety of each worker.

(3) Mechanical ventilation of the confined space prior to entry and continued ventilation to provide a safe atmosphere.

(4) Testing the atmosphere of the confined space prior to entry and on a regular basis for presence of sufficient oxygen (19.5 percent) and absence of hazardous levels of toxic or combustible gases or vapors.

(5) Emergency rescue procedures with a requirement that trained personnel are available and are stationed outside the confined space with proper equipment to provide for the rescue of persons entering the space. Such

Appendix A

ITEM NUMBER STANDARD, REGULATION OR SECTION OF THE ACT VIOLATED; DESCRIPTION	DATE BY WHICH VIOLATION MUST BE CORRECTED	PENALTY
equipment must include safety harness and life lines with provisions for hoisting employees from the confined space. If entry is required for rescue, the rescuing employee must be equipped with approved air supplied respiratory equipment and other appropriate personal protective equipment.		
(6) Training of any and all employees required to enter the confined spaces after toxic compounds have been introduced into the vehicle. This training shall include procedures required prior to entry and the hazards associated with work in confined spaces.		
The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for illness.		
2a 29 CFR 1910.1000(a)(2): Employee(s) were exposed to material(s) in excess of the 8-hour time weighted average limit(s) listed for the particular material(s) in Table Z-1 of subpart Z of 29 CFR part 1910:	*Step 1 Immediately	$9,000
(a) Employees were exposed to 1,1,2 trichloro 1,2,2, trifluoroethane in excess of 1,000 ppm for an 8-hour TWA in that an employee was found unconscious in M-1 Tank, Hull Number 163 located at Bay L-23 on 9/21/83 at approximately 4:50 p.m. due to this expo-		

Appendix A

ITEM NUMBER STANDARD, REGULATION OR SECTION OF THE ACT VIOLATED; DESCRIPTION	DATE BY WHICH VIOLATION MUST BE CORRECTED	PENALTY
sure. Calculated range of exposure was approximately 1,200 to 5,000 ppm TWA. Possible means of abatement include but are not limited to: 1. Exhaust ventilation. 2. Substitution of non-toxic compound. Excess exposure to 1,1,2 trichloro 1,2,2 trifluoroethane can lead to heart arythmia and/or narcosis.		
2b 29 CFR 1910.1000(e): Feasible administrative or engineering controls were not determined and implemented to reduce employee exposure(s):	*Step 2 1/11/84	
(a) In Bay L-23 an employee cleaning inside M-1 Tank #163 was overexposed to 1,1,2 trichloro 1,2,2, trifluoroethane and feasible administrative and/or engineering controls had not been implemented.	*Step 3 5/28/84	
*Step 1 — Effective respiratory protection shall be provided and used by employee(s) as an interim protective measure.		
*Step 2 — Submit to the Area Director a written detailed plan of abatement outlining a schedule for the implementation of engineering and/or administrative measures to control employee exposures to hazardous substances as referenced in this citation. This plan shall include, at a minimum, target dates for the following		

Appendix A

ITEM NUMBER STANDARD, REGULATION OR SECTION OF THE ACT VIOLATED; DESCRIPTION	DATE BY WHICH VIOLATION MUST BE CORRECTED	PENALTY
actions which should be consistent with the dates required by this citation: (a) Evaluation of the extent and location of hazard source; (b) Evaluation of control measure options; (c) Selection of optimum control measure(s); (d) Determination of control measure design; (e) Ordering and delivery of equipment and materials; (f) Installation of control measures; (g) Training of employees in the proper operation and maintenance of the newly implemented control measures; and (h) Assurance of effective performance of control measures. *Step 3 — Correction shall be completed by the implementation of feasible engineering and/or administrative controls and their effectiveness at achieving compliance verified. All proposed control measures shall be approved for each particular use by a competent industrial hygienist or other technically qualified person. Ninety (90) day progress reports required during the abatement period.		
		$18,000

AREA DIRECTOR

/ms /s/ CHARLES E. BURIN

NOTICE TO EMPLOYEES — The law gives an employee or his representative the opportunity to object to any abatement date set for a violation if he believes the date to be unreasonable. The contest must be mailed to the U.S. Department of Labor Area Office at the address shown above within 15 working days (excluding weekends and Federal holidays) of the receipt by the employer of this citation and penalty.

EMPLOYER DISCRIMINATION UNLAWFUL — The law prohibits discrimination by an employer against an employee for filing a complaint or for exercising any rights under this Act. An employee who believes that he has been discriminated against may file a compiaint no later than 30 days after the discrimination with the U.S. Department of Labor Area Office at the address shown above.

EMPLOYER RESPONSIBILITIES AND COURSES OF ACTION — The enclosed booklet outlines employer responsibilities and courses of action and should be read in conjunction with this notification.

CITATION AND NOTIFICATION OF PENALTY

OSHA-2 REV. 5/75

APPENDIX B

Appendix B

code of federal regulations

Labor

29

PARTS 1900 TO 1910

Revised as of July 1, 1986

Subparts U—Y [Reserved]

Subpart Z—Toxic and Hazardous Substances

AUTHORITY: Secs. 6 and 8, Occupational Safety and Health Act, 29 U.S.C. 655, 657; Secretary of Labor's Orders Nos. 12-71 (36 FR 8754), 8-76 (41 FR 25059), or 9-83 (48 FR 35736), as applicable; and 29 CFR Part 1911.

Section 1910.1000 Tables Z-1, Z-2, Z-3 also issued under 5 U.S.C. 553.

Section 1910.1000 not issued under 29 CFR Part 1911, except for "Arsenic" and "Cotton Dust" listings in Table Z-1.

Section 1910.1002 not issued under 29 U.S.C. 655 or 29 CFR Part 1911; also issued under 5 U.S.C. 553.

Sections 1910.1003 through 1910.1018 also issued under 29 U.S.C. 653.

Section 1910.1025 also issued under 29 U.S.C. 653 and 5 U.S.C. 556.

Section 1910.1043 also issued under 5 U.S.C. 551 et seq.

Sections 1910.1045 and 1970.1047 also issued under 29 U.S.C. 653.

Sections 1910.1499 and 1910.1500 also issued under 5 U.S.C. 553.

SOURCE: 39 FR 23502, June 27, 1974, unless otherwise noted. Redesignated at 40 FR 23073, May 28, 1975.

§ 1910.1000 Air contaminants.

An employee's exposure to any material listed in table Z-1, Z-2, or Z-3 of this section shall be limited in accordance with the requirements of the following paragraphs of this section.

(a) Table Z-1:

(1) *Materials with names preceded by "C"—Ceiling Values.* An employee's exposure to any material in table Z-1, the name of which is preceded by a "C" (e.g., C Boron trifluoride), shall at no time exceed the ceiling value given for that material in the table.

(2) *Other materials—8-hour time weighted averages.* An employee's exposure to any material in table Z-1, the name of which is not preceded by "C", in any 8-hour work shift of a 40-hour work week, shall not exceed the 8-hour time weighted average given for that material in the table.

(b) Table Z-2: (1) *8-hour time weighted averages.* An employee's exposure to any material listed in table Z-2, in any 8-hour work shift of a 40-hour work week, shall not exceed the 8-hour time weighted average limit given for that material in the table.

(2) *Acceptable ceiling concentrations.* An employee's exposure to a material listed in table Z-2 shall not exceed at any time during an 8-hour shift the acceptable ceiling concentration limit given for the material in the table, except for a time period, and up to a concentration not exceeding the maximum duration and concentration allowed in the column under "acceptable maximum peak above the acceptable ceiling concentration for an 8-hour shift".

(3) *Example.* During an 8-hour work shift, an employee may be exposed to a concentration of Benzene above 25 p.p.m. (but never above 50 p.p.m.) only for a maximum period of 10 minutes. Such exposure must be compensated by exposures to concentrations less than 10 p/m so that the cumulative exposure for the entire 8-hour work shift does not exceed a weighted average of 10 p/m

(c) Table Z-3: An employee's exposure to any material listed in table Z-3, in any 8-hour work shift at a 40-hour work week, shall not exceed the 8-hour time weighted average limit given for that material in the table.

(d) Computation formulae:

(1) (i) The cumulative exposure for an 8-hour work shift shall be computed as follows:

$$(E=C_aT_aC_bT_b+\ldots C_nT_n) \div 8$$

Where:

E is the equivalent exposure for the working shift.

C is the concentration during any period of time *T* where the concentration remains constant.

T is the duration in hours of the exposure at the concentration *C*.

The value of *E* shall not exceed the 8-hour time weighted average limit in table Z-1, Z-2, or Z-3 for the material involved.

(ii) To illustrate the formula prescribed in paragraph (d)(1)(i) of this section, note that isoamyl acetate has an 8-hour time weighted average limit of 100 p.p.m. (table Z-1). Assume that an employee is subject to the following exposure:

Two hours exposure at 150 p/m
Two hours exposure at 75 p/m
Four hours exposure at 50 p/m

Substituting this information in the formula, we have

$$(2\times150+2\times75+4\times50) \div 8=81.25 \text{ p/m}$$

Since 81.25 p.p.m. is less than 100 p.p.m., the 8-hour time weighted average limit, the exposure is acceptable.

(2)(i) In case of a mixture of air contaminants an employer shall compute the equivalent exposure as follows:

$$E_m=(C_1\div L_1+C_2\div L_2)+ \ldots (C_n\div L_n)$$

Where:

Em is the equivalent exposure for the mixture.

C is the concentration of a particular contaminant.

L is the exposure limit for that contaminant, from table Z-1, Z-2, or Z-3.

The value of *Em* shall not exceed unity (1).

(ii) To illustrate the formula prescribed in paragraph (d)(2)(i) of this section, consider the following exposures:

Material	Actual concentration of 8-hour exposure	8-hour time weighted average exposure limit
Acetone (Table Z-1)	500 p/m	1,000 p/m
2-Butanone (Table Z-1).....	45 p/m	200 p/m
Toluene (Table Z-2)	40 p/m	200 p/m

Substituting in the formula, we have:

$Em=500\div1{,}000+45\div200+40\div200$
$Em=0.500+0.225+0.200$
$Em=0.925$

Since Em is less than unity (1), the exposure combination is within acceptable limits.

(e) To achieve compliance with paragraphs (a) through (d) of this section, administrative or engineering controls must first be determined and implemented whenever feasible. When such controls are not feasible to achieve full compliance, protective equipment or any other protective measures shall be used to keep the exposure of employees to air contaminants within the limits prescribed in this section. Any equipment and/or technical measures used for this purpose must be approved for each particular use by a competent industrial hygienist or other technically qualified person. Whenever respirators are used, their use shall comply with § 1910.134.

TABLE Z-1

Substance	p/m[a]	mg./M[3b]
Acetaldehyde	200	360
Acetic acid	10	25
Acetic anhydride	5	20
Acetone	1,000	2,400
Acetonitrile	40	70
Acetylene dichloride, see 1, 2-Dichloroethylene		
Acetylene tetrabromide	1	14
Acrolein	0.1	0.25
Acrylamide—Skin		0.3
Aldrin—Skin		0.25
Allyl alcohol—Skin	2	5
Allyl chloride	1	3
C Allylgiycidyl ether (AGE)	10	45
Allyl propyl disulfide	2	12
2-Aminoethanol, see Ethanolamine		
2-Aminopyridine	0.5	2
Ammonia	50	35
Ammonium sulfamate (Ammate)		15
n-Amyl acetate	100	525
sec-Amyl acetate	125	650
Aniline—Skin	5	19
Anisidine (o, p-isomers)—Skin		0.5
Antimony and compounds (as Sb)		0.5
ANTU (alpha naphthyl thiourea)		0.3
Arsenic organic compounds (as As)		0.5
Arsine	0.05	0.2
Azinphos-methyl—Skin		0.2
Barium (soluble compounds)		0.5
p-Benzoquinone, see Quinone		
Benzoyl peroxide		5
Benzyl chloride	1	5
Biphenyl, see Diphenyl		
Boron oxide		15
C Boron trifluoride	1	3
Bromine	0.1	0.7

TABLE Z-1 — Continued

Substance	p/m[a]	mg./M[3b]
Bromoform—Skin	0.5	5
Butadiene (1, 3-butadiene)	1,000	2,200
Butanethiol, see Butyl mercaptan		
2-Butanone	200	590
2-Butoxy ethanol (Butyl Cellosolve)—Skin	50	240
Butyl acetate (n-butyl acetate)	150	710
sec-Butyl acetate	200	950
tert-Butyl acetate	200	950
Butyl alcohol	100	300
sec-Butyl alcohol	150	450
tert-Butyl alcohol	100	300
C Butylamine—Skin	5	15
C tert-Butyl chromate (as CrO_3)—Skin		0.1
n-Butyl glycidyl ether (BGE)	50	270
Butyl mercaptan	10	35
p-tert-Butyltoluene	10	60
Calcium oxide		5
Camphor		2
Carbaryl (Sevin®)		5
Carbon black		3.5
Carbon dioxide	5,000	9,000
Carbon monoxide	50	55
Chlordane—Skin		0.5
Chlorinated camphene—Skin		0.5
Chlorinated diphenyl oxide		0.5
C Chlorine	1	3
Chlorine dioxide	0.1	0.3
C Chlorine trifluoride	0.1	0.4
C Chloroacetaldehyde	1	3
a-Chloracetophenone (phenacylchloride)	0.05	0.3
Chlorobenzene (monochlorobenzene)	75	350
o-Chlorobenzylidene malononitrile (OCBM)	0.05	0.4
Chlorobromomethane	200	1,050

TABLE Z-1 — Continued

Substance	p/m[a]	mg./M[3b]
2-Chloro-1,3-butadiene, see Chloroprene		
Chlorodiphenyl (42 percent Chlorine)—Skin		1
Chlorodiphenyl (54 percent Chlorine)—Skin		0.5
1-Chloro, 2,3-epoxypropane, see Epichlorhydrin		
2-Chloroethanol, see Ethylene chlorohydrin		
Chloroethylene, see Vinyl chloride		
C Chloroform (trichloromethane)	50	240
1-Chloro-1-nitropropane	20	100
Chloropicrin	0.1	0.7
Chloroprene (2-chloro-1,3- butadiene)—Skin	25	90
Chromium. sol. chromic, chromous salts as Cr		0.5
Metal and insol. salts		1
Coal tar pitch volatiles (benzene soluble fraction) anthracene, BaP, phenanthrene, acridine, chrysene, pyrene		0.2
Cobalt, metal fume and dust		0.1
Copper fume		0.1
Dusts and Mists		1
Cotton dust (raw)	e	
Crag® herbicide		15
Cresol (all isomers)—Skin	5	22
Crotonaldehyde	2	6
Cumene—Skin	50	245
Cyanide (as CN)—Skin		5
Cyclohexane	300	1,050
Cyclohexanol	50	200
Cyclohexanone	50	200
Cyclohexene	300	1,015

TABLE Z-1 — Continued

Substance	p/m[a]	mg./M[3][b]
Cyclopentadiene	75	200
2,4-D		10
DDT—Skin		1
DDVP—Skin		1
Decaborane—Skin	0.05	0.3
Demeton®—Skin		0.1
Diacetone alcohol (4-hydroxy-4-methyl-2-pentanone)	50	240
1,2-diaminoethane, see Ethylenediamine		
Diazomethane	0.2	0.4
Diborane	0.1	0.1
Dibutyl phosphate	1	5
Dibutylphthalate		5
C o-Dichlorobenzene	50	300
p-Dichlorobenzene	75	450
Dichlorodifluoromethane	1,000	4,950
1,3-Dichloro-5,5-dimethyl hydantoin		0.2
1,1-Dichloroethane	100	400
1,2-Dichloroethylene	200	790
C Dichloroethyl ether—Skin	15	90
Dichloromethane, see Methylenechloride		
Dichloromonofluoromethane	1,000	4,200
C 1,1-Dichloro-1-nitroethane	10	60
1,2-Dichloropropane, see Propylene-dichloride		
Dichlorotetrafluoroethane	1,000	7,000
Dieldrin—Skin		0.25
Diethylamine	25	75
Diethylamino ethanol—Skin	10	50
Diethylether, see Ethyl ether		
Difluorodibromomethane	100	860
C Diglycidyl ether (DGE)	0.5	2.8
Dihydroxybenzene, see Hydroquinone		
Diisobutyl ketone	50	290

TABLE Z-1 — Continued

Substance	p/m[a]	mg./M[3b]
Diisopropylamine—Skin	5	20
Dimethoxymethane, see Methylal		
Dimethyl acetamide—Skin	10	35
Dimethylamine	10	18
Dimethylaminobenzene, see Xylidene		
Dimethylaniline (N-dimethyl- aniline)—Skin	5	25
Dimethylbenzene see Xylene		
Dimethyl 1,2-dibromo-2,2-dichloroetnyl phosphate, (Dibrom)		3
Dimethylformamide—Skin	10	30
2,6-Dimethylheptanone, see Diisobutyl kentone		
1,1-Dimethylhydrazine—Skin	0.5	1
Dimethylphthalate		5
Dimethylsulfate—Skin	1	5
Dinitrobenzene (all isomers)— Skin		1
Dinitro-o-cresol—Skin		0.2
Dinitrotoluene—Skin		1.5
Dioxane (Diethylene dioxide)— Skin	100	360
Diphenyl	0.2	1
Diphenylmethane diisocyanate (see Methylene bisphenyl isocyanate (MDI)		
Dipropylene glycol methyl ether—Skin	100	600
Di-sec. octyl phthalate (Di-2-ethylhexylphthalate)		5
Edrin—Skin		0.1
Epichlorhydrin—Skin	5	19
EPN—Skin		0.5
1,2-Epoxypropane, see Propylenoxide		
2,3-Epoxy-1-propanol, see Glycidol		

TABLE Z-1 — Continued

Substance	p/m³	mg./M³[b]
Ethanethiol, see Ethylmercaptan		
Ethanolamine	3	6
2-Ethoxyethanol—Skin	200	740
2-Ethoxyethylacetate (Cello-solve acetate)—Skin	100	540
Ethyl acetate	400	1,400
Ethyl acrylate—Skin	25	100
Ethyl alcohol (ethanol)	1,000	1,900
Ethylamine	10	18
Ethyl sec-amyl ketone (5- methyl-3-heptanone)	25	130
Ethyl benzene	100	435
Ethyl bromide	200	890
Ethyl butyl ketone (3- Heptanone)	50	230
Ethyl chloride	1,000	2,600
Ethyl ether	400	1,200
Ethyl formate	100	300
C Ethyl mercaptan	10	25
Ethyl silicate	100	850
Ethylene chlorohydrin—Skin	5	16
Ethylenediamine	10	25
C Ethylene glycol dinitrate and/or Nitroglycerin—Skin	[4]0.2	1
Ethylene glycol monomethyl ether acetate, see Methyl cellosolve acetate		
Ethylene imine—Skin	0.5	1
Ethylidine chloride, see 1,1- Dichlorothane		
N-Ethylmorpholine—Skin	20	94
Ferbam		15
Ferrovanadium dust		1
Fluoride (as F)		2.5
Fluorine	0.1	0.2

TABLE Z-1 — Continued

Substance	p/m³	mg./M³[b]
Fluorotrichloromethane	1,000	5,600
Formic acid	5	9
Furfural—Skin	5	20
Furfuryl alcohol	50	200
Glycidol (2,3-Epoxy-1- propanol)	50	150
Glycol monoethyl ether, see 2-Ethoxyethanol		
Guthion®, see Azinphosmethyl		
Hafnium		0.5
Heptachlor—Skin		0.5
Heptane (n-heptane)	500	2,000
Hexachloroethane—Skin	1	10
Hexachloronaphthalene—Skin		0.2
Hexane (n-hexane)	500	1,800
2-Hexanone	100	410
Hexone (Methyl isobutyl ketone)	100	410
sec-Hexyl acetate	50	300
Hydrazine—Skin	1	1.3
Hydrogen bromide	3	10
C Hydrogen chloride	5	7
Hydrogen cyanide—Skin	10	11
Hydrogen peroxide (90%)	1	1.4
Hydrogen selenide	0.05	0.2
Hydroquinone		2
C Iodine	0.1	1
Iron oxide fume		10
Isoamyl acetate	100	525
Isoamyl alcohol	100	360
Isobutyl acetate	150	700
Isobutyl alcohol	100	300
Isophorone	25	140
Isopropyl acetate	250	950
Isopropyl alcohol	400	980
Isopropylamine	5	12
Isopropylether	500	2,100
Isopropyl glycidyl ether (IGE)	50	240

TABLE Z-1 — Continued

Substance	p/m[a]	mg./M[3][b]
Ketene	0.5	0.9
Lindane—Skin		0.5
Lithium hydride		0.025
L.P.G. (liquified petroleum gas)	1,000	1,800
Magnesium oxide fume		15
Malathion—Skin		15
Maleic anhydride	0.25	1
C Manganese		5
Mesityl oxide	25	100
Methanethiol, see Methyl mercaptan		
Methoxychlor		15
2-Methoxyethanol, see Methyl cellosolve		
Methyl acetate	200	610
Methyl acetylene (propyne)	1,000	1,650
Methyl acetylene-propadiene mixture (MAPP)	1,000	1,800
Methyl acrylate—Skin	10	35
Methylal (dimethoxymethane)	1,000	3,100
Methyl alcohol (methanol)	200	260
Methylamine	10	12
Methyl amyl alcohol, see Methyl isobutyl carbinol		
Methyl (n-amyl) ketone (2- Heptanone)	100	465
C Methyl bromide—Skin	20	80
Methyl butyl ketone, see 2-Hexanone		
Methyl cellosolve—Skin	25	80
Methyl cellosolve acetate—Skin	25	120
Methyl chloroform	350	1,900
Methylcyclohexane	500	2,000
Methylcyclohexanol	100	470

TABLE Z-1 — Continued

Substance	p/m[a]	mg./M[3b]
o-Methylcyclohexanone—Skin	100	460
Methyl ethyl ketone (MEK), see 2-Butanone		
Methyl formate	100	250
Methyl iodide—Skin	5	28
Methyl isobutyl carbinol—Skin	25	100
Methyl isobutyl ketone, see Hexone		
Methyl isocyanate—Skin	0.02	0.05
C Methyl mercaptan	10	20
Methyl methacrylate	100	410
Methyl propyl ketone, see 2-Pentanone		
C# Methyl styrene	100	480
C Methylene bisphenyl isocyanate (MDI)	0.02	0.2
Molybdenum:		
Soluble compounds		5
Insoluble compounds		15
Monomethyl aniline—Skin	2	9
C Monomethyl hydrazine—Skin	0.2	0.35
Morpholine—Skin	20	70
Naphtha (coaltar)	100	400
Naphthalene	10	50
Nickel carbonyl	0.001	0.007
Nickel, metal and soluble cmpds, as Ni		1
Nicotine—Skin		0.5
Nitric acid	2	5
Nitric oxide	25	30
p-Nitroaniline—Skin	1	6
Nitrobenzene—Skin	1	5
p-Nitrochlorobenzene—Skin		1
Nitroethane	100	310
C Nitrogen dioxide	5	9
Nitrogen trifluoride	10	29
C Nitroglycerin—Skin	0.2	2
Nitromethane	100	250

TABLE Z-1 — Continued

Substance	p/m[a]	mg./M[3b]
1-Nitropropane	25	90
2-Nitropropane	25	90
Nitrotoluene—Skin	5	30
Nitrotrichloromethane, see Chloropicin	.....	.....
Octachloronaphthalene—Skin	.....	0.1
Octane	500	2,350
Oil mist, mineral	.....	5
Osmium tetroxide	.....	0.002
Oxalic acid	.....	1
Oxygen difluoride	0.05	0.1
Ozone	0.1	0.2
Paraquat—Skin	.....	0.5
Parathion—Skin	.....	0.1
Pentaborane	0.005	0.01
Pentachloronaphthalene—Skin	.....	0.5
Pentachlorophenol—Skin	.....	0.5
Pentane	1,000	2,950
2-Pentanone	200	700
Perchloromethyl mercaptan	0.1	0.8
Perchloryl flouride	3	13.5
Petroleum distillates (naphtha)	500	2,000
Phenol—Skin	5	19
p-Phenylene diamine—Skin	.....	0.1
Phenyl ether (vapor)	1	7
Phenyl ether-biphenyl mixture (vapor)	1	7
Phenylethylene, see Styrene	.....	.....
Phenyl glycidyl ether (PGE)	10	60
Phenylhydrazine—Skin	5	22
Phosdrin (Mevinphos®)—Skin	.....	0.1
Phosgene (carbonyl chloride)	0.1	0.4
Phosphine	0.3	0.4
Phosphoric acid	.....	1
Phosphorous (yellow)	.....	0.1
Phosphorus pentachloride	.....	1
Phosphorus pentasulfide	.....	1

TABLE Z-1 — Continued

Substance	p/m[a]	mg./M[3][b]
Phosphorus trichloride	0.5	3
Phthalic anhydride	2	12
Picric acid—Skin	.....	0.1
Pival® (2-Pivalyl-1,3- indandione)	.....	0.1
Platinum (Soluble salts) as Pt	.....	0.002
Propane	1,000	1,800
n-Propyl acetate	200	840
Propyl alcohol	200	500
n-Propyl nitrate	25	110
Propylene dichloride	75	350
Propylene imine—Skin	2	5
Propylene oxide	100	240
Propyne, see Methylacetylene	.....	.....
Pyrethrum	.....	5
Pyridine	5	15
Quinone	0.1	0.4
Rhodium, Metal fume and dusts, as Rh	.....	0.1
Soluble salts	.....	0.001
Ronnel	.....	15
Rotenone (commercial)	.....	5
Selenium compounds (as Se)	.....	0.2
Selenium hexafluoride	0.05	0.4
Silver, metal and soluble compounds	.....	0.01
Sodium fluoroacetate (1080)—Skin	.....	0.05
Sodium hydroxide	.....	2
Stibine	0.1	0.5
Stoddard solvent	500	2,900
Strychnine	.....	0.15
Sulfur dioxide	5	13
Sulfur hexafluoride	1,000	6,000
Sulfuric acid	.....	1
Sulfur monochloride	1	6
Sulfur pentafluoride	0.025	0.25
Sulfuryl fluoride	5	20

TABLE Z-1 — Continued

Substance	p/m[a]	mg./M[3][b]
Systox, see Demeton®		
2,4,5T		10
Tantalum		5
TEDP—Skin		0.2
Tellurium		0.1
Tellurium hexafluoride	0.02	0.2
TEPP—Skin		0.05
C Terphenyls	1	9
1,1,1,2-Tetrachloro-2,2-difluoroethane	500	4,170
1,1,2,2-Tetrachloro-1,2-difluoroethane	500	4,170
1,1,2,2-Tetrachloroethane—Skin	5	35
Tetrachloromethane, see Carbon tetrachloride		
Tetrachloronaphthalene—Skin		2
Tetraethyl lead (as Pb)—Skin		0.075
Tetrahydrofuran	200	590
Tetramethyl lead (as Pb)—Skin		0.075
Tetramethyl succinonitrile—Skin	0.5	3
Tetranitromethane	1	8
Tetryl (2,4,6-trinitrophenyl- methylnitramine)—Skin		1.5
Thallium (soluble compounds)—Skin as Tl		0.1
Thiram		5
Tin (inorganic cmpds, except oxides		2
Tin (organic cmpds)		0.1
C Toluene-2,4-diisocyanate	0.02	0.14
o-Toluidine—Skin	5	22
Toxaphene, see Chlorinated camphene		
Tributyl phosphate		5
1,1,1-Trichloroethane, see Methyl chloroform		

TABLE Z-1 — Continued

Substance	p/m[a]	mg./M[3b]
1,1,2-Trichloroethane—Skin	10	45
Titaniumdioxide		15
Trichloromethane, see Chloroform		
Trichloronaphthalene—Skin		5
1,2,3-Trichloropropane	50	300
1,1,2-Trichloro 1,2,2-Trifluoroethane	1,000	7,600
Triethylamine	25	100
Trifluoromonobromomethane	1,000	6,100
2,4,6-Trinitrophenol, see Picric acid		
2,4,6-Trinitrophenylmethyl- nitramine, see Tetryl		
Trinitrotoluene—Skin		1.5
Triorthocresyl phosphate		0.1
Triphenyl phosphate		3
Turpentine	100	560
Uranium (soluble compounds)		0.05
Uranium (insoluble compounds)		0.25
C Vanadium:		
V_2O_3 dust		0.5
V_2O_3 fume		0.1
Vinyl benzene, see Styrene		
Vinylcyanide, see Acrylonitrile		
Vinyl toluene	100	480
Warfarin		0.1
Xylene (xylol)	100	435
Xylidine—Skin	5	25
Yttrium		1
Zinc chloride fume		1
Zinc oxide fume		5
Zirconium compounds (as Zr)		5

This standard applies in cotton yarn manufacturing until compliance with § 1910.1043(c) and (e) is achieved.

[a]Parts of vapor or gas per million parts of contaminated air by volume at 25° C. and 760 mm. Hg pressure.

[b]Approximate milligrams of particulate per cubic meter of air.

TABLE Z-1 — Continued

(No footnote "c" is used to avoid confusion with ceiling value notations.)

[d]An atmospheric concentration of not more than 0.02 p.p.m., or personal protection may be necessary to avoid headache.

[e]This 8 hour time weighted average is for respirable dust as measured by a vertical elutriator cotton dust sampler or equivalent instrument. This time weighted average applies to the cotton waste processing operations of waste recycling (sorting, blending, cleaning, and willowing) and garnetting.

TABLE Z-2

Material	8-hour time weighted average	Acceptable ceiling concentration	Acceptable maximum peak above the acceptance ceiling concentration for an 8-hour shift	
			Concentration	Maximum duration
Benzene (Z37.40-1969).	10 p.p.m.....	25 p.p.m.....	50 p.p.m	10 minutes.
Beryllium and beryllium compounds (Z37.29-1970).	2 μg./M³	5 μg./M³	25 μg./M³..	30 minutes.
Cadmium fume (Z37.5-1970).	0.1 mg./M³ ...	0.3 mg./M³ ...	.....	
Cadmium dust (Z37.5-1970).	0.2 mg./M³ ...	0.6 mg./M³ ...	.....	
Carbon disulfide (Z37.3-1968).	20 p.p.m.....	30 p.p.m.....	100 p.p.m ...	30 minutes.
Carbon tetrachloride (Z37.17-1967).	10 p.p.m.....	25 p.p.m.....	200 p.p.m ...	5 minutes in any 4 hours.
Chromic acid and chromates (Z37.7-1971).	.....	1 mg./10M³ ..	.....	
Ethylene dibromide (Z37.31-1970).	20 p.p.m.....	30 p.p.m.....	50 p.p.m	5 minutes.
Ethylene dichloride (Z37.21-1969).	50 p.p.m.....	100 p.p.m.....	200 p.p.m ...	5 minutes in any 3 hours.
Formaldehyde (Z37.16-1967).	3 p.p.m.....	5 p.p.m.....	10 p.p.m	30 minutes.
Hydrogen fluoride (Z37.28-1969).	3 p.p.m.....	.....	.....	
Hydrogen sulfide (Z37.2-1966).	.....	20 p.p.m.....	50 p.p.m	10 minutes once only if no other measurable exposure occurs.

TABLE Z-2 — Continued

Material	8-hour time weighted average	Acceptable ceiling concentration	Acceptable maximum peak above the acceptance ceiling concentration for an 8-hour shift	
			Concentration	Maximum duration
Fluoride as dust (Z37.28-1969).	2.5 mg./M³ ...	.....	.....	
Mercury (Z37.8-1971).	.....	1 mg./10M³ ..	.....	
Methyl chloride (Z37.18-1969).	100 p.p.m.....	200 p.p.m.....	300 p.p.m ...	5 minutes in any 3 hours.
Methylene chloride (Z37.23-1969).	500 p.p.m.....	1,000 p.p.m ...	2,000 p.p.m..	5 minutes in any 2 hours.
Organo (alkyl) mercury (Z37.30-1969).	0.01 mg./M³ ..	0.04 mg./M³ ..	.....	
Styrene (Z37.15-1969).	100 p.p.m.....	200 p.p.m.....	600 p.p.m ...	5 minutes in any 3 hours.
Tetrachloroethylene (Z37.22-1967).	...do	...do	300 p.p.m ...	5 minutes in any 3 hours.
Toluene (Z37.12-1967)	200 p.p.m.....	300 p.p.m.....	500 p.p.m ...	10 minutes.
Trichlorethylene (Z37.19-1967).	100 p.p.m.....	200 p.p.m.....	300 p.p.m ...	5 minutes in any 2 hours.

TABLE Z-3

Substance	Mppcf [e]	Mg/M³
Silica:		
Crystalline:		
Quartz (respirable)	250 [f]	10mg/M³ [m]
	%SiO_2+5	%SiO_2+2
Quartz (total dust)		30mg/M³
		%S_2O_2+2
Cristobalite: Use ½ the value calculated from the count or mass formulae for quartz		
Tridymite: Use ½ the value calculated from the formulae for quartz		
Amorphous, including natural diatomaceous earth	20	80mg/M³
		%SiO_2
Silicates (less than 1% crystalline silica):		
Mica	20	
Soapstone	20	
Talc (non-asbestos-form)	20[n]	
Talc (fibrous). Use asbestos limit		
Tremolite (see talc, fibrous)		
Portland cement	50	
Graphite (natural)	15	
Coal dust (respirable fraction less than 5% SiO_2		2.4mg/M³
		or
For more than 5% SiO_2		10mg/M³
		%SiO_2+2
Inert or Nuisance Dust:		
Respirable fraction	15	5mg/M³
Total dust	50	15mg/M³

NOTE: Conversion factors—mppcf × 35.3 = million particles per cubic meter = particles per c.c.

[e] Millions of particles per cubic foot of air, based on impinger samples counted by light-field technics.

TABLE Z-3 — Continued

[f] The percentage of crystalline silica in the formula is the amount determined from air-borne samples, except in those instances in which other methods have been shown to be applicable.

[m] Both concentration and percent quartz for the application of this limit are to be determined from the fraction passing a size-selector with the following characteristics:

[n] Containing <1% quartz; if 1% quartz, use quartz limit.

Aerodynamic diameter (unit density sphere)	Percent passing selector
2	90
2.5	75
3.5	50
5.0	25
10	0

The measurements under this note refer to the use of an AEC instrument. The respirable fraction of coal dust is determined with a MRE; the figure corresponding to that of 2.4 Mg/M^3 in the table for coal dust is 4.5 Mg/M^3.

[39 FR 23502, June 27, 1974. Redesignated and amended at 40 FR 23072, 23073, May 28, 1975; 42 FR 22525, May 3, 1977; 43 FR 2600, Jan. 17, 1978; 43 FR 5963, Feb. 10, 1978; 43 FR 13563, Mar. 31, 1978; 43 FR 19624, May 5, 1978; 43 FR 27394, June 23, 1978; 43 FR 45809, Oct. 3, 1978; 43 FR 53007, Nov. 14, 1978; 43 FR 57602, Dec. 8, 1978; 46 FR 32022, June 19, 1981; 49 FR 25796, June 22, 1984; 50 FR 51173, Dec. 13 1985]

APPENDIX C

Appendix C

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

SECRETARY OF LABOR,
Complainant,

v. OSHRC Docket No. 83-1293

GENERAL DYNAMICS LAND SYSTEMS DIVISION, INC.,
Respondent,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and its LOCAL UNION NO. 1200,
Authorized Employee Representative.

APPEARANCES:

Richard J. Fiore, Esquire, and Mark A. Holbert, Esquire, Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois, on behalf of complainant.

John P. Hancock, Esquire, and Lisabeth Coakley, Esquire, Butzel, Long, Gust, Klein and Van Zile, Detroit, Michigan, on behalf of respondent.

Beverly Tucker, Esquire, and Diane Thomas, Law Clerk, United Automobile, Aerospace and Agricultural Implement Workers of America, International Union, Detroit, Michigan, on behalf of the authorized employee representative.

Charles Farrugia, Health and Safety Representative, United Automobile, Aerospace and Agricultural Implement Workers of America, Local Union No. 1200, on behalf of the authorized employee representative.

Appendix C

DECISION AND ORDER

BRADY, Judge: This proceeding is brought pursuant to section 10 of the Occupational Safety and Health Act of 1970 ("Act") to contest a citation alleging two willful violations of the Act, and a proposed penalty in the amount of $18,000. General Dynamics Land Systems Division, Inc., ("General Dynamics"), is charged with violating the general duty requirements of section 5(a)(1) of the Act and specific standards under section 5(a)(2) at 29 C.F.R. § 1910.1000(a) and (e). The violations are alleged to have occurred while respondent was engaged in the production of M1 Abrams Main Battle Tanks at the Detroit Arsenal Tank Plant (DATP) which it had taken over from the Chrysler Corporation in March 1982.

The violations are described in the citation in pertinent part as follows:

> 5(a)(1)
> ...employees working in the Heavy Repair, Test and Adjust, Marriage and M1 Hull Line were required to spray or pour varying quantities of 1,1,2 trichloro 1,2,2 trifluoroethane into the turret and driver's compartments of M1 tanks and immediately enter these compartments to perform clean-up and other routine tasks thereby exposing themselves to the hazard of asphyxiation and/or chemical poisoning. A confined space entry procedure, specific for these operations, had not been implemented when toxic compounds were introduced into the vehicle.
>
> 29 C.F.R. 1910.1000(a)(2) -
> ...employees were exposed to 1,1,2 trichloro 1,2,2 trifluoroethane in excess of 1,000 ppm for an 8-hour TWA in that an employee was found unconscious in M1 Tank, Hull Number 163 located at Bay L-23.... Calculated range of exposure was approximately 1,200 to 5,000 ppm TWA.

29 C.F.R. 1910.1000(e) -
...and feasible administrative and/or engineering controls had not been implemented.

There is no dispute that 1,1,2 tricholoro 1,2,2 trifluoroethane ("freon" or "the solvent") was used as a cleaning agent during production and repair of the tanks. The solvent is a colorless liquid described as having a "light ethereal" (sweet) odor. It has a high vaporization rate and is of high density, being six and one-half times heavier than air. While less toxic than most commercial solvents, inhalation of high concentrations can cause depression of the central nervous system, cardiac arrythmia (irregular heart beat), and even cardiac arrest.

The M1 tank is produced in three assembly stages at the DATP. The hull assembly, turret assembly, and when connected, become fully assembled or the married vehicle. The hull enters the assembly department as an open structure with various electrical components, hydraulic lines, rolled wheels and tracks. Assembly fitters install components to the vehicle including the engine, and it becomes drivable. The hull and turret are connected in the Marriage Department and any needed repairs are performed. The vehicle is then inspected and tested in the Heavy Repair or Test and Adjust Department. These production tasks are performed by tank repairmen, assembly fitters, and inspectors, all skilled tradesmen. The solvent is used during each stage of assembly, usually in cleaning up hydraulic fluid or fuel which has been spilled.

The M1 Abrams tank, unlike it predecessor the M60 tank, has increased hydraulic systems which contributes to larger amounts of oil spillage and leaks.

THE ALLEGED VIOLATION OF SECTION 5(a)(1)

The inspection which gave rise to issuance of the citation was conducted by Mr. David Morgan, an Industrial Hygiene Supervisor for the Occupational Safety and Health Administration

(OSHA). He commenced his investigation because an employee, Charles Paling, was seriously injured from exposure to freon vapor while working in the driver's compartment of a fully assembled tank.

Respondent is charged with failure to develop and implement a safe employee entry procedure into the tank compartments when the atmosphere was known to have been altered and contaminated by the solvent vapors. The willful charge is based on allegations that respondent knew the configuration of the compartments presented recognized hazards associated with confined spaces yet required its employees to enter and work in the spaces without providing the necessary precautions. It is also alleged that respondent has a history of non-response to frequent employee complaints and union requests that affected employees be protected.

Mr. Charles Paling, a tank repairman, testified to the events which led to his being overcome by the solvent on September 21, 1983. He stated that, as a repairman in the Test and Adjust Department, he was assigned to correct deficiencies on Tank No. 163 (Tr. 800). One such deficiency was a leak in a one-inch hydraulic line on the turret distribution manifold. In order to make the repair, Mr. Paling gained access to the line by entering the driver's compartment head first and positioning himself facing the rear of the vehicle. As a result of replacing the line, oil spilled onto the turret distribution manifold and turret floor (Tr. 802-804). At Paling's request his co-worker, Steven Valentine, brought him a pail containing three to four gallons of freon which he poured on the manifold and turret platform to clean up the spill (Tr. 808). At this point, the testimony differs as to what actually occurred. According to Mr. Valentine, Paling immediately reentered the driver's compartment to check his repair. Valentine then left the area as he was instructed to perform work on another tank. When he returned approximately 20 minutes later, he found Paling unconscious in the tank (Tr. 919-920). Paling, however, testified that, after pouring the freon, he imme-

diately got out of the vehicle, set up his air mover to "blow out the fumes" and proceeded to work on the outside of the vehicle (Tr. 809). He indicated the tank was ventilated for about 45 minutes to an hour with the three hatches and the drain open (Tr. 854, 868). Paling also related that when he re-entered the tank to check the line, he noted another leak; and, while preparing to break the line, he passed out (Tr. 812, 813). After six days of hospitalization, he was discharged with the following diagnosis (Ex. C-33(c), "Discharge Summary"):

> Trichlorotrifluroethane Exposure, Industrial, Severe.
> Atrial Fibrillation.
> Atrial and Ventricular Extrasystoles.

In order to establish a violation of section 5(a)(1) of the Act, the Act's general duty clause, the Secretary must prove: (1) that the employer failed to render its workplace free of a hazard which was (2) "recognized," and (3) causing or likely to cause death or serious physical harm, and (4) that feasible means existed to free the workplace of the hazard. *Empire-Detroit Steel Division v. OSHRC*, 579 F.2d 378, 383 (6th Cir. 1978); *National Realty & Construction Co. v. OSHRC*, 489 F.2d 1257, 1265 (D.C. Cir. 1973).

The proof required to establish the first two elements of the alleged violation provides the basis for this dispute. A considerable amount of evidence was presented to establish that the driver's, crew and hull compartments of the tank constituted "confined space," necessitating safe employee entry procedures. Generally, the characteristics of a "confined space" are that the space is: (1) an enclosure, (2) having limited means of access or egress, and (3) not subject to good natural ventilation (Ex. C-35(a), (b), (c), (d)). In addition, the Secretary attempts to show respondent had full knowledge of the hazards associated with employees working in confined spaces because in August 1982 an employee was rendered unconscious from his exposure to freon.

The record discloses that the employee representative's complaint to OSHA on August 25, 1982, indicated that freon vapor had accumulated in a pit under a conveyor line where the employee was injured. This was followed by an investigation of the incident by OSHA, and issuance of a citation for violation of section 5(a)(1). Implementation of a confined space entry procedure throughout the plant was recommended to abate the hazards. The matter was subsequently resolved by a settlement agreement in *Secretary v. General Dynamics Land Systems, Inc.*, OSHRC Docket No. 82-1001 (Ex. C-7, C-8). The agreement, in part, states as follows:

> (a) Respondent represents that the violative conditions alleged have been abated in accordance with the abatement procedures set forth in the Citation by the implementation of amended Confined Space and Lockout Procedures developed with the full input and cooperation of authorized employee representatives.
>
> (b) To the best of Respondent's knowledge and belief, Respondent is currently complying, and in the future will in good faith continue to comply, with the provisions of the Act, and applicable standards promulgated pursuant thereto.

The evidence shows that a confined space entry procedure was implemented at the plant, which was acceptable to complainant (Tr. 504).

Respondent now argues that the confined space entry procedures developed at the plant were not intended to include the M1 tanks. Also, at no time was it advised or made aware that confined space hazards were associated with its use of the solvent in the tanks until issuance of the instant citation.

In support of this argument, respondent relied upon the background testimony of its Safety and Health Director, Edmund Matthews. Mr. Matthews was aware that freon had been used at the plant even prior to 1974. It was preferred as a solvent because of its relatively low toxicity, high rate of evaporation without

residue, and lack of combustibility. He had first investigated its toxic effects in 1976 (Tr. 2299-2300).

Following the OSHA inspection in 1982, Matthews stated he conducted a survey of the plant and compiled a list of confined spaces within the meaning of the Michigan Occupational Safety and Health Act (MIOSHA). He also developed safe entry procedures for those spaces, took air samples, provided portable ventilation systems, lifelines and safety harnesses. In addition, confined space entry classes were conducted for employees having occasion to work in the designated spaces (Tr. 2289-2295).

Respondent also argues that the Health and Safety Representative for the employee's union did not recognize the tank as being a confined space. The list of confined spaces submitted by the union in accordance with the settlement agreement did not include the M1 tank in either its married or unmarried configuration (Tr. 1343, 1344).

Although the compliance officer who conducted the initial inspection was not called to testify in this proceeding, it can be reasonably assumed he thoroughly investigated the use of freon at the DATP, including its use in the M1 tanks. This becomes quite evident since another complaint was filed with OSHA by the union concerning use of the solvent in the tanks. The complaint stated in part, that "employees made to wash out tanks with 14 gallons of freon" and "employees made to drive under the influence of these gases" (Ex. C-9). This complaint was investigated by the same compliance officer whose earlier inspection resulted in the citation. Upon completion of this inspection, neither he nor OSHA advised respondent the M1 tank was considered a confined space, or that use of freon inside the tank presented a potential hazard (Tr. 442, 446, 2298).

The inspecting officer was clearly aware of the solvent's use in the tanks as Mr. Charles Farrugia, the Health and Safety Representative for the local union, testified that he personally explained how it was being used by employees inside the tanks

(Tr. 1353). It is also obvious that the OSHA investigation included an evaluation of the control measures implemented by respondent (Tr. 436, 2315-2317).

Although the record indicates a number of employees have complained of ill effects from working with the solvent, General Dynamics presented evidence to show it had responded adequately to the complaints and that it has maintained safe controls and procedures. It is noted that a grievance filed by the union through a formal labor-management procedure regarding use of freon was withdrawn (Ex. C-2). Also, in August 1983, the International Union's Safety Representative conducted an inspection at DATP with Mr. Farrugia. The inspection was followed by a meeting with company officials regarding health and safety problems, but employee use of the solvent was not included in the topics discussed (Tr. 1430-1431). Thus, it would appear respondent employed acceptable work procedures.

The Secretary strongly contends that the respondent had actual knowledge of the hazards associated with employee entry into confined spaces and knowingly exposed its employees to such hazards in the M1 tanks. The record indicates, however, that the basic criteria for identifying a confined space requiring safe entry procedures is the extent of enclosure and inadequacy of natural ventilation to purge the atmosphere. In the instant case, Mr. Paling testified the hatches and drains were open when he ventilated the space for up to an hour as part of his normal procedure. The conditions under which he worked suggest safe operating procedures were being employed which included purging of the atmosphere by mechanical ventilation.

Generally, there appears some question regarding the sufficiency of the evidence to establish the violation. However, a ruling upon consideration of all the evidence will not be made as the allegations of the violation are inappropriate and must be vacated because the alleged hazard is addressed by a specific standard.

The declared purpose of the Act is to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . . 29 U.S.C. § 651(b). While the Act contemplates specific safety standards, its purposes are also effectuated by the general duty clause because it is obvious the Secretary can not promulgate specific standards to protect employees from every conceivable hazardous condition. The legislative history of the Act reflects this view through the comments of the Senate Committee on Labor and Public Welfare which in part state:

> The general duty clause in this bill would not be a general substitute for reliance on standards, but would simply enable the Secretary to insure the protection of employees who are working under special circumstances for which no standard has yet been adopted. S. Rept. No. 91-1282, 91st Cong., 2d Sess. (1970) at 9, 10.

The general rule of statutory construction requires that the specific takes precedent over the general. *See, e.g., Clifford F. MacEvoy Co. v. United States,* 322 U.S. 10, 107 (1941). This principle is recognized by the Secretary in the regulation at 29 C.F.R. 1910.5(c)(1) which provides:

> If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process . . . .

The Commission has also adopted this principle and established it as precedent by stating:

> It is the opinion of the Commission that a citation for a violation of section 5(a)(1) is invalid and will not lie, where a duly promulgated occupational safety and health standard is applicable to the condition or practice that is alleged to constitute a violation of the Act. [*Brisk Waterproofing Co.,*

73 OSAHRC 30/E1, 1 BNA OSHC 1263, 1973-74 CCH OSHD ¶ 15,392 (No. 1046, 1973)]

Thus, under the Act, a citation alleging violation of section 5(a)(1) is inappropriate if the hazard is addressed by a standard. *Daniel International, Inc.*, 82 OSAHRC 23/D3, 10 BNA OSHC 1556, 1982 CCH OSHD ¶ 26,033 (No. 78-4279, 1982). However, when no specific standard entirely protects against the hazard alleged, citation under 5(a)(1) is proper. *Ted Wilkerson, Inc.*, 81 OSAHRC 70/D8, 9 BNA OSHC 2012, 1981 CCH OSHD ¶ 25,551 (No. 13390, 1981); *Peter Cooper Corp.*, 81 OSAHRC 101/A2, 10 BNA OSHC 1203, 1211, 1981 CCH OSHD ¶ 25,795, p. 32,238 (No. 76-596, 1981).

In support of its position that 5(a)(1) is proper in this case, complainant cites the Commission decision in *ConAgra, Inc.*, 83 OSAHRC 5/C7, 11 BNA OSHC 1141, 1145, 1983-1984 CCH OSHD ¶ 26,764 (No. 79-1146, 1983), where it is stated:

> The failure to test in a confined atmosphere before possible exposure of employees to toxic substances is a violation distinct from a continued exposure to known quantities of substances listed in section 1910.1000.

The foregoing exception is not applicable to the facts in this case because of the procedure followed by Paling in ventilating the atmosphere, and that the air contaminants standard deals fully and completely with the hazard at issue, which is employee use of trichloro trifluoroethane in production of the M1 tank. Also, in *ConAgra, supra*, the Commission did not deviate from its precedent by again stating:

> We note that the purpose of the general duty clause is to provide protection against recognized hazards where no duty under a specific standard exists, and that specific, promulgated standards will preempt the general duty clause, but only with respect to hazards, conditions or practices expressly covered by the specific standards. . . .

Clearly, the circumstances of this case are governed solely by the regulations at 29 C.F.R. § 1910.1000(a)—(d) which set forth the limits of employee exposure to trichloro trifluoroethane. Protection is provided against any potential hazards associated with employee use of the solvent by specifically prescribed levels within which the employees may safely work. In addition, the employer is specifically notified of the manner in which abatement is to be accomplished by 1910.1000(e) which requires the following:

> "[A]dministrative controls, engineering controls, personal protective equipment or 'any other protective measures'. . . . The employer must use one or more of the specified measures to assure full protection for the employees, whatever the circumstances or the nature of the employer's operations." *Todd Shipyards Corp.*, 81 OSAHRC 69/A2, 9 BNA OSHC 2031, 2034, 1981 CCH OSHD ¶ 25,516 at p. 31,812 (No. 77-2545, 1981).

The decision in this case recognizes that specific standards "are intended to be the primary method of achieving the policies of the Act." *Brennan v. OSHRC and Underhill Construction Corp.*, 513 F.2d 1032, 1038 (2d Cir. 1975). And further, "the standards presumably give the employer superior notice of the alleged violation and should be used instead of the general duty clause whenever possible." *Usery v. Marquette Cement Manufacturing Co.*, 569 F.2d 902, 905 (2d Cir. 1975). Necessarily, the employer has a legal obligation to comply with the safety regulations specifically promulgated to accomplish the stated purpose of the Act.

That part of the citation alleging violation of section 5(a)(1) is vacated.

Appendix C

THE ALLEGED VIOLATIONS OF THE SPECIFIC STANDARDS AT 29. C.F.R. § 1910.1000(a)(2) AND 29 C.F.R. § 1910.1000(e)

The standards under section 1910.1000 pertain to air contaminants and state in pertinent part as follows:

> An employee's exposure to any material listed in table Z-1, Z-2, or Z-3 of this section shall be limited in accordance with the requirements of the following paragraphs of this section.
>
> (a) Table Z-1:
>
> * * *
>
> (2) An employee's exposure to any material in table Z-1, the name of which is not preceded by "C", in any 8-hour work shift of a 40-hour work week, shall not exceed the 8-hour time weighted average given for that material in the table.
>
> * * *
>
> (e) To achieve compliance with paragraph (a) through (d) of this section, administrative or engineering controls must first be determined and implemented whenever feasible. When such controls are not feasible to achieve full compliance, protective equipment or any other protective measures shall be used to keep the exposure of employees to air contaminants within the limits prescribed in this section. . . .

The alleged violations are described in the citation as follows:

> 29 CFR 1910.1000(a)(2)
> Employees were exposed to 1,1,2 trichloro 1,2,2 trifluoroethane in excess of 1,000 ppm for an 8-hour TWA in that an employee was found unconscious in M-1 Tank, Hull Number 163 located at Bay L-23 on 9/21/83 at approxi-

mately 4:50 p.m. due to this exposure. Calculated range of exposure was approximately 1,200 to 5,000 ppm TWA. . . .

29 CFR 1910.1000(e)
In Bay L-23 an employee cleaning inside M-1 Tank #163 was overexposed to 1,1,2 trichloro 1,2,2 trifluoroethane and feasible administrative and/or engineering controls had not been implemented. . . .

The Commission has held that in order to establish a violation under section 5(a)(2), it is necessary for the Secretary to show by a preponderance of the evidence that (1) the cited standard applies; (2) there was a failure to comply with the standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharmaceutical Products, Inc.*, 82 OSAHRC 55/E9, 9 BNA OSHC 2126, 1982 CCH OSHD ¶ 26,251 (No. 78-6247, 1982); *Daniel International Corp.*, 81 OSAHRC 71/D6, 9 BNA OSHC 2027, 1977-78 CCH OSHD ¶ 21,679 (No. 76-181, 1977).

The Secretary also contends that these violations occurred when tank repairman Charles Paling was exposed to the solvent on September 21, 1983. There is no question the cited standards are applicable. The solvent used by Paling, 1,1,2 trichloro 1,2,2 trifluoroethane, is listed in Table Z-1 of 29 C.F.R. part 1910 which requires an eight-hour time weighted average exposure limitation of 1,000 parts of vapor per million parts of air (PPM). Subsection (e) sets forth the required controls to reduce exposure to the material in order to achieve compliance with subsection (a). The primary issue relates to the proof required to establish the employer's failure to comply with subsection (a).

The record reveals that under the circumstances, representatives of OSHA were unable to take actual samples of the atmosphere in which Mr. Paling was working at the time he sustained his injury. Following an investigation of the facts and circumstances, a technique known as "mathematical calculation"

was utilized to determine Paling's range of exposure to the solvent (Ex. C-14, p. 4; Tr. 106-108, 143, 144). The formula used to determine the vapor concentration is as follows (TR. 150-151):

> The concentration of the material's vapor expressed in parts per million (C) is equal to the volume of the material in the liquid form expressed in milliliters (v), times the density of the substance expressed in grams per milliliter (p), times the volume that one mole of the material would occupy at normal temperature and atmospheric pressure expressed in liters (24.4), divided by the molecular weight of the material expresseed in grams (MW), all divided by the atmospheric volume of the space or enclosure expressed in liters (vt), all multiplied by one million.

(or)

$$C(\text{ppm}) = \frac{v(\text{ml})p(\text{gm/ml})24.4(\text{liters})MW(\text{gm})}{Vt(\text{liters})} \times 10^6$$

After determining the vapor concentration, an eight-hour time weighted average (TWA) exposure is found by inserting the concentration into the formula set forth in the regulation. Thus, the equivalent exposure for an eight-hour work shift expressed in parts per million (E) is equal to the vapor concentration expressed in parts per million (C), times the duration of that exposure expressed in hours or minutes (T), all divided by 8 hours or 480 minutes, (or)

$$E\ (\text{ppm}) = \frac{C(\text{ppm})\ T(\text{hours})}{8\ \text{hours}}$$

Based upon the foregoing formula and the stipulated atmospheric volume of a fully assembled M1 tank to be 268.5 cubic feet (Ex. C-29), complainant determined an eight-hour TWA exposure to one gallon of solvent for five minutes to be 1,048.6 PPM. The exposure to two gallons for ten minutes amounts to 4,194.3 PPM (Tr. 157).

The record shows that the vapor concentrations calculated from the formula are baseed on certain factual assumptions. These assumptions, respondent maintains, are so inaccurate and unreliable that they fail to provide a basis to prove overexposure. Complainant asserts, however, that the assumptions either had no significant effect on the ultimate exposure determination or actually resulted in a lower exposure determination. The questionable assumptions are: (1) that Paling introduced one to two gallons of solvent into the M1 tank (Tr. 117); (2) that none of the solvent introduced had drained out of the tank (Tr. 393); (3) that the M1 tank was a closed space with no opening when the solvent was introduced (Tr. 151-152); (4) that there was no ventilation in the compartments of the tank where Paling was working (Tr. 152); (5) that there was total evaporation of the solvent introduced (Tr. 152); (6) that the duration of Paling's exposure was five minutes (Tr. 132).

The evidence does show that the assumptions are in error. Mr. Paling estimated that he used between three and four gallons of the solvent prior to his injury (Tr. 808). This amount is consistent with the testimony of Steven Valentine, his co-worker who brought the solvent to Paling in a five-gallon bucket, which Valentine stated was one-half to three-quarters full (Tr. 918). While the amount of solvent assumed to have been used is in error, it is less than the amount actually used, and therefore the error is favorable to respondent's position.

Mr. Paling also testified that the solvent was poured near the drain which was open and some of the liquid solvent necessarily drained out of the tank. This of course means that not all of the solvent evaporated. In addition, Paling's testimony revealed that the three hatches on the tank were open (Tr. 862-868).

The period of Paling's exposure varied from his account of 5 to 10 minutes, to Valentine's account of about 20 minutes (Tr. 133, 920). But regardless of the foregoing, the period of exposure used in the formula assumes the period commenced a few minutes after Paling introduced the solvent (Tr. 401). This

assumption is erroneous because Paling actually introduced the solvent then ventilated the compartment for 45 minutes to an hour before he re-entered it (Tr. 867).

The question of ventilation as it relates to exposure is a highly significant factor in this case. While the Secretary concedes a ventilating device (air mover)* was employed by Paling during the assumed period of exposure, it is asserted the location rendered it essentially ineffective. This apparently is based on Paling's testimony that he thought the device was entirely inside the tank and located on the turret seal pump above his right shoulder (Tr. 810). This testimony is consistent with that of Mark Burns, a process inspector at the facility, who testified to the position of the turret seal pump in relation to the hatch (Ex. C-36(a)(b); Tr. 1126-1133).

The location of the air mover takes on added meaning in light of the testimony of the Secretary's expert witness, Dr. Sheldon Rabinowitz. Dr. Rabinowitz, who had conducted laboratory experiments to simulate conditions at the time of Paling's injury, found that the only uncontaminated air being introduced came through the compressed air line which operates the device. Therefore, all other air drawn through and blown out of the air mover was recirculated contaminated air from within the vehicle and the vapor concentration of the solvent increased with the high rate of evaporation (Tr. 1623, 1627-1628, 1739). He found that 1.6 gallons of the solvent would have evaporated within 25 minutes (Tr. 1638-39). The precise location of the air mover can not be clearly determined from the record. On cross-examination, Mr. Paling stated that he believed the device was outside the tank or close to being inside or outside (Tr. 870, 871). It is clear,

---

*An "air mover" is a ventilation device which is essentially shaped like a tube, approximately 5½ inches long and 3¼ inches in diameter and operates by connecting it to a compressed air hose (Tr. 1131, 1617-1618, 1622). The principle behind this device's operation is that compressed air moved along circular channels within the device, creates a vacuum where outside air will be sucked through and out of the device at an increased velocity (Tr. 1617-1618).

however, that he waited 45 to 60 minutes to ventilate the tank before re-entering it (Tr. 401, 402). Also, during this period, the drain and hatches were open, factors not part of the calculations by the Secretary or the experiment of Dr. Rabinowitz.

Respondent points out that both Mr. Morgan and Dr. Rabinowitz agreed if the actual facts had been used in the calculations rather than the facts assumed by complainant, the exposure level would have been significantly reduced (Tr. 391-406). Mr. Morgan agreed that the critical factors associated with use of the formula "are what you put into the equation" (Tr. 428). Dr. Rabinowitz also agreed that, if the tank was ventilated for 45 minutes even with the air mover inside, the 1.6 gallons of solvent would result in less that one thousand parts per million (Tr. 1672-1673). He indicated that the air flow rate through the device would be between 500 and 1,000 cubic feet per minute (Tr. 1622).

Respondent also presented the finding of its expert, Dr. Richard Carchman, who calculated the actual facts into the same formula used by complainant. That at the time of the Paling incident, all the hatches of the tank were open, the drains were open, an air blower was used and Paling ventilated the tank for 45 to 60 minutes before entering. He concluded that Paling's exposure was far below the time weighted average alleged (Tr. 320-322).

Dr. Carchman had also testified that he had prepared a document on the health effects of trochloro trifluoroethane for the Environmental Protection Agency entitled, *Health Assessment Document for 1,1,2 trichloro 1,2,2 trifluroethane* (Ex. R-10; Tr. 3194, 3195). His research indicated that the interaction between the solvent and a stimulant such as epinephrine or adrenaline caused a sensitization to lower concentrations of the solvent which could effect the heart (Tr. 3203, 3204). Although no attempt will be made to determine if Paling had developed a sensitivity to freon, the record discloses such a possibility existed. The evidence shows he had been taking prescription diet pills

which could have contained the stimulant which in turn could cause heart toxicity (Ex. C-33; Tr. 3207, 3208).

The proof of the violation under the standard rests essentially on the employee's exposure to the intensity of the trichloro trifluoroethane vapor for a prescribed period of time. In this case, there was no direct proof of the actual concentrations of freon — such as air sampling of the atmosphere at the time of employee Paling's exposure. Thus, the Secretary's proof is based on "mathematical calculation," and the medical findings following Paling's accident. The calculation utilizes a basic gas law formula to determine the concentration of a material in the atmosphere of a known volume. Regardless of the method of proof, however, the Secretary must establish by a preponderance of the evidence, a failure to comply with the standard. *Olin Construction v. OSHRC*, 525 F.2d 464 (2d Cir. 1975). Preponderance of evidence has been defined as "that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by the proponent are more probably true than false." *Ultimate Distribution Systems, Inc.*, 82 OSAHRC 22/B12, 11 BNA OSHC 1568, 1570 1982 CCH OSHD ¶ 26,011 (No. 79-1269, 1982).

Upon full consideration of the evidence in the record, it is held that the Secretary failed to meet his burden in proving the violation. The mathematical calculation method through employment of the formula, necessarily involves use of certain assumptions which directly effect the exposure determination. Accurate levels of exposure can, therefore, only be determined with the use of assumed facts which accurately reflect the conditions which prevailed at the time of Paling's injury. It is thus concluded that the erroneous assumptions used in the formula resulted in unreliable and inaccurate levels of exposure, which is deemed highly speculative.

The period and manner in which the tank was ventilated are crucial factors in determining exposure utilizing the formula in mathematical calculation. Both of complainant's expert witnesses, who testified regarding the calculations, admitted that, if the

actual facts had been used in the calculations, the exposure levels would have been significantly reduced. Respondent's expert witness, whose calculations under the same formula included the actual facts, concluded exposure far below the level alleged.

Although the evidence indicates Paling suffered from exposure to trichloro trifluoroethane, such evidence is not convincing that his exposure was in excess of the permissible level according to the standard.

The citation is, therefore, vacated.

FINDINGS OF FACT

1. General Dynamics, at all times hereinafter mentioned, maintained a place of business at 28251 Van Dyke Road, Warren, Michigan. It had been engaged in the business of manufacturing M1 Abrams battle tanks since March 1982 when it took over the operation of the facility from the Chrysler Corporation.

2. Commencing September 29, 1983, authorized representatives of the Secretary conducted an inspection of the aforesaid work site. As a result, respondent was issued the citation alleging willful violations of the Act with notice of proposed penalties for its use of trichloro trifluoroethane at the workplace.

3. Trichloro trifluoroethane was used by employees in varying amounts as a cleaning solvent inside the compartments of both the fully assembled and partially assembled tanks.

4. The solvent has a high evaporation rate and a vapor density six and a half times heavier than air. Although less toxic than most commercial solvents, inhalation of high concentrations is dangerous and can prove fatal.

5. On September 10, 1982, respondent was issued a citation for violation of section 5(a)(1) of the Act. The citation, which was affirmed, alleged that employees were exposed to the hazard of asphyxiation when they entered pits where vapors and gases

had accumulated. The violation was abated in accordance with a settlement agreement which provided for implementation of a confined space entry procedure throughout the plant.

6. The designated spaces at the plant which were approved by the parties for safe confined entry procedures did not include the M1 tanks.

7. The compliance officer, who had conducted three inspections of the workplace prior to issuance of the instant citation, was aware of how employees used the solvent and the procedures respondent had developed for its use in the tanks. He, at no time, advised respondent that employee use of the solvent in the tanks presented a potential hazard.

8. A formal grievance filed with the employer by the authorized employee representative regarding use of the solvent by employees was withdrawn on August 16, 1983. Also, in August 1983, safety representatives of the international and local unions conducted a walkaround inspection at DATP. At a meeting with company officials following the inspection, employee use of the solvent was not a matter raised for discussion.

9. The specific air contaminants standard at 29 C.F.R. § 1910.1000 governs employee use of trichloro trifluoroethane at the workplace and any potential hazards associated with use thereof in the M1 tanks.

10. Neither OSHA nor the authorized employee representative conducted atmospheric testing such as the taking of air samples in the tanks. This included the date of September 21, 1983, when tank repairman Charles Paling was injured.

11. OSHA determined the range of Paling's exposure to the solvent on September 21, 1983, by mathematical calculation using a vapor concentration formula.

12. The assumptions made by the Secretary regarding critical factors in utilizing the formula were erroneous. This resulted

in a significantly inaccurate and unreliable exposure determination.

13. After Paling poured the solvent into the tank, it was ventilated for 45 minutes to an hour with the three compartment hatches and the drain system open before he re-entered it.

14. The ventilating procedures employed by Paling are in accordance with the hazard abatement procedures outlined in the citation issued September 10, 1982.

15. The atmospheric volume of a fully assembled M1 tank is 268.5 cubic feet and the ventilating device use by Paling moved between 500 and 1,000 cubic feet of air per minute.

CONCLUSIONS OF LAW

1. General Dynamics, at all times pertinent hereto, was an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act, and the Commission has jurisdiction of the parties and subject matter herein pursuant to section 10(c) thereof.

2. Respondent is, and at all times pertinent hereto, required to comply with the Act and the safety and health regulations promulgated thereunder.

3. Respondent was not in violation of section 5(a)(1) or the standards at 29 C.F.R. § 1910.1000(a) and 29 C.F.R. § 1910.1000(e) as alleged in the citation.

ORDER

On the basis of the foregoing findings of fact, conclusions of law and the entire record, it is hereby ORDERED:

The citation is hereby VACATED.

/s/ Paul L. Brady
Judge

APPENDIX D

Appendix D

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET, NW
WASHINGTON, D C 20006

September 24, 1985

IN REFERENCE TO SECRETARY OF LABOR v.
OSHRC
General Dynamics Land Sytems Div., Inc. DOCKET No. 83-1293

NOTICE OF FINAL ORDER

The petition for discretionary review filed by *Union and Secretary* was received by the Commission on *September 19 & 20, 1985.*

The decision of the Administrative Law Judge became a final order of the Commission on *9/23/85.*

NOTICE IS GIVEN TO THOSE LISTED BELOW:

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FOR THE COMMISSION

Ray H. Darling, Jr.
EXECUTIVE SECRETARY

2 ##

APPENDIX E

Appendix E

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1760

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE and AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*, PETITIONERS

v.

GENERAL DYNAMICS LAND SYSTEMS DIVISION, RESPONDENT

No. 85-1826

WILLIAM E. BROCK, SECRETARY OF LABOR, PETITIONER

v.

GENERAL DYNAMICS LAND SYSTEMS DIVISION, *et al.*, RESPONDENTS

Petitions for Review of an Order of the Occupational Safety and Health Review Commission

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Argued November 17, 1986

Decided April 14, 1987

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Appendix E

Andrea C. Casson, Assistant Counsel, Department of Labor, with whom *Joseph M. Woodward*, Counsel, Department of Labor, was on the brief, for petitioner Brock in No. 85-1826.

Jordan Rossen, *Ralph O. Jones*, and *Beverly Tucker* were on the brief for petitioners International Union, *et al.*, in No. 85-1760.

John P. Hancock, Jr., for respondents General Dynamics Land Systems Division, Inc., *et al.*

Before STARR and BUCKLEY, *Circuit Judges*, and AUBREY E. ROBINSON, JR.,* *Chief Judge*, United States District Court for the District of Columbia.

Opinion for the court filed by *Circuit Judge* BUCKLEY.

BUCKLEY, *Circuit Judge*: The Occupational Safety and Health Administration ("OSHA") cited General Dynamics Land Systems Division ("General Dynamics" or the "Company") for workplace violations of a statute and of administrative safety standards. An administrative law judge ("ALJ") found that as General Dynamics conformed with the safety standards, it could not be found to have violated the statutory requirement. The Occupational Safety and Health Review Commission (the "Commission") adopted the ALJ's decision as its own. Petitioners urge us to vacate the order insofar as it holds that a specific OSHA safety standard preempts enforcement of a general statutory duty to assure workplace safety. We vacate the challenged portion of the order and hold that, in the circumstances of this case, an employer's compliance with OSHA's standards will not discharge his statutory obligation to provide employees with safeguards against recognized hazards.

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* Sitting by designation pursuant to 28 U.S.C. § 292(a) (1982).

Appendix E

I. Background

General Dynamics manufactures M-1 Abrams tanks in a Department of Defense facility called the Detroit Arsenal Tank Plant ("Plant"). Abrams tanks have internal hydraulic systems that sometimes leak during assembly. For several months prior to November 1983, General Dynamics employees had used a solvent called 1,1,2 trichloro 1,2,2 trifluoroethane ("solvent" or "freon") to clean up resulting oil spills. The solvent evaporates quickly. While it is less toxic than other commercial solvents, in its gaseous state it is heavier than air and may cause serious illness or death. It tends to accumulate in assembly-line pits and tank hulls, displacing oxygen and creating a risk of asphyxiation. In high concentrations it may also cause cardiac arrythmia and eventual arrest. *See* Brief for Petitioners International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW and its Local 1200 ("UAW") at 4; Brief for Petitioner Secretary of Labor ("Secretary") at 10-11.

According to the UAW, General Dynamics stored the solvent at the Plant in fifty-five-gallon drums "with no limit on the amount that could be obtained until November 15, 1983 when its use was discontinued throughout the plant." Brief for UAW at 4. During the period it was in use, the solvent was available in several areas of the Plant. *Id.* Employees in the Tank-Hull Assembly Department, for example, used the solvent in cup-sized quantities to clean spills of up to half a pint of oil. *Id.* at 5. To clean larger spills of up to ten or fifteen gallons of hydraulic fluid, however, "employees would use [gallon-sized] buckets or 2½ gallon spray containers to apply solvent to the affected area." *Id.* This procedure would consist of "dumping gallons of the solvent into the hull where it would evaporate or exit through a drain on the floor." *Id.* Sometimes employees would enter a hull still containing liquid solvent and oil to vacuum them out.

Employees would also use the solvent in large quantities in the Plant's Heavy Repair Department. *Id.* at 9.

General Dynamics does not reject petitioners' description of cleaning procedures at the Plant. *See* Brief for General Dynamics at 2-29 (statement of facts). Rather, it explains that "[t]he manner in which 'tank repairmen' . . . performed the various repairs was essentially a matter of the team's discretion because all tank repairmen were highly skilled . . . ." *Id.* at 17. Such discretion was subject, however, to the requirement that tank hulls be ventilated when employees used solvent in quantities larger than one pint. *Id.* Its safety officers conducted training sessions with employees to "describe[] the potential hazards associated with use of the solvent, and stated that employees should try to restrict the quantities used and also use ventilation whenever more than 1 pint was used inside a fully assembled tank." *Id.* at 12.

The incidents leading to this litigation began shortly after the Company commenced production of the M-1 tank in March 1982. Brief for Secretary at 7. A Plant employee was overcome by fumes in August 1982 after entering an assembly-line pit containing freon vapors. *Id.* at 11. After an inspection, OSHA issued a citation authorized by section 9 of the Occupational Safety and Health Act of 1970 (the "Act"), 29 U.S.C. § 658 (1982). The citation charged General Dynamics with violations of section 5(a) of the Act, 29 U.S.C. § 654(a) (1982), which provides:

> Each employer—
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
>
> (2) shall comply with occupational safety and health standards promulgated under this chapter.

Specifically, General Dynamics was charged with a violation of its statutory duty to provide safe working conditions under subsection 5(a)(1) ("general duty clause") and to observe safety standards issued pursuant to subsection 5(a)(2) ("safety standards" or "specific standards"). General Dynamics reached a settlement with OSHA in June 1983 in which the Company affirmed that it had implemented amended confined-space procedures and agreed that "in the future [it] will in good faith continue to comply[] with the provisions of the Act, *and* applicable standards promulgated pursuant thereto." Joint Appendix ("J.A.") at 964 (emphasis added).

In March 1983, another Plant employee became dizzy and weak after driving a fully assembled tank. Brief for Secretary at 12. As a result of this incident, General Dynamics posted a safety bulletin at the Plant that read in part:

> [Trichloro trifluoroethane] vapors being 6½ times heavier than air will readily displace oxygen in pits and enclosed spaces such as the inside of tracked vehicles. Ventilation must be utilized when this solvent is used in enclosed spaces, otherwise its use must be limited to one pint quantities.

General Dynamics Land Systems Division Safety Bulletin ¶ 4 (April 1983); J.A. at 1006.

Again on July 9, 1983, a General Dynamics employee from another plant, Frederick Spearing, became seriously ill at the Plant's test track while sitting inside the driver's compartment of a tank. He remained in that position while two employees poured several gallons of solvent onto the floor of the tank. Moreover, to clear an opening for the solvent to enter, employees rotated the tank's turret in such a manner that it blocked the only exit from the compartment where Mr. Spearing was sitting. He lost consciousness in the presence of a supervisor. J.A. at 367-70; Brief for Secretary at 14-15. The relevant General Dynamics injury report ascribed the injury

"to inhalation of fumes from Genesolv D (trichloro-trifluoroethane)." Supervisors Report of Accident (July 11, 1983); J.A. at 971.

In yet a third incident on September 21, 1983, Plant employee Charles Paling also suffered from exposure to solvent fumes. After entering a tank and pouring approximately two gallons of solvent to clean a hydraulic leak, Paling exited and used a portable device to ventilate the tank. This was in apparent compliance with the ventilation requirement in the safety bulletin that was issued following the incident of March 1983. Paling then reentered the tank. Another employee later discovered him inside the driver's compartment shaking and foaming from the mouth. Brief for UAW at 10-11; Brief for Secretary at 16; *see* J.A. at 299-314, 343-48.

As it had done before, the UAW complained to OSHA about the Paling incident. While OSHA conducted an investigation, a General Dynamics employee at a different plant died from exposure to solvent fumes. Brief for Secretary at 12 n.8; J.A. at 719. Shortly thereafter, on November 29, 1983, OSHA cited General Dynamics for violations of section 5(a)(1) of the Act ("statutory charge"), and of OSHA's specific standard for governing an employee's exposure to the solvent, 29 C.F.R. § 1910.1000(a)(2) & (e). OSHA sought penalties totalling $18,000.

The statutory charge stated that General Dynamics had violated section 5(a)(1) because it "did not furnish employment and a place of employment which were free from recognized hazards" associated with exposure to solvent vapors in confined spaces requiring special entry procedures. Citation at 1; J.A. at 7. General Dynamics contested this citation, and the matter was referred to the ALJ. After hearing evidence for eighteen days, he determined, as a matter of law, that "the circumstances of this case are governed solely by the regulations at 29 C.F.R. § 1910.1000(a)-(d) which set forth the limits of

employee exposure to trichloro trifluoroethane." ALJ decision at 12; J.A. at 119. Subsection (a) provides that employers must not expose employees to a time-weighted average of more than 1,000 parts per million of trichloro trifluoroethane vapors during any eight-hour work shift of a forty-hour work week. 29 C.F.R. § 1910.1000(a) (the "freon standard"). The freon standard calculates the concentration of solvent vapors by volume at a given temperature and pressure.

The ALJ reasoned that "a ruling upon consideration of all the evidence will not be made as the allegations of the [section 5(a)(1)] violation are inappropriate and must be vacated because the alleged hazard is *addressed by* a specific standard." Order at 9-10; J.A. at 116-17 (emphasis added). In support of this conclusion he cited (1) the legislative history of the Act and its general policy aims, (2) a rule of statutory construction that the "specific takes precedence over the general," and (3) OSHA's preemption regulation in 29 C.F.R. § 1910.5(c)(1) as interpreted by the Commission. The ALJ also held that "the Secretary failed to meet his burden in proving the violation" of the freon standard, and that the evidence offered "is not convincing that [the employee's] exposure was in excess of the permissible level according to the standard." ALJ decision at 20-21; J.A. at 127-28.

The ALJ's decision and order became a final order of the Commission by virtue of the failure of any commissioner to direct internal review within thirty days. *See* 29 U.S.C. § 661(j) (1982). The UAW filed a petition for review in this court. The Secretary first proceeded in the United States Court of Appeals for the Eighth Circuit, but his petition was transferred to this court and consolidated with that of the UAW. General Dynamics responds to both petitions, and the Commission responds only to the Secretary's petition.

Petitioners do not challenge the ALJ's conclusion that General Dynamics did not violate the freon standard.

They both argue, however, that the ALJ erred in vacating that part of the citation charging a violation of the general duty clause. They contend that OSHA's standard for trichloro trifluoroethane defines a narrow set, and the general duty clause a larger set, of unsafe workplace conditions. The relationship between these sets is the crux of the dispute. Petitioners argue that the hazards cited at the Plant extend beyond those addressed by the freon standard, and that an employer's compliance with that standard is not a substitute for compliance with the general duty imposed by section 5(a)(1). They also maintain that the court should defer to the Secretary's construction of OSHA regulations. Finally, the Secretary contends that the challenged portion of the final order represents an unexplained departure from Commission precedent.

General Dynamics responds that the hazards at issue are within the scope of the freon standard, that its compliance with that standard relieves it of any responsibility for the alleged violations under the general duty clause, that OSHA's regulations so require, and that the ALJ's interpretation of these regulations is not unreasonable and deserves deference. The Company also argues that the final order does not ignore Commission precedent.

We conclude that the Commission erred in its construction of OSHA's regulations because it misunderstood the structure of the Act that authorizes the regulations. We also conclude that the Commission acted arbitrarily and capriciously in refusing to follow its own precedent.

II. Discussion

A. *The Nature of the Inquiry*

The issue before us is whether, as a matter of law, the Company's compliance with the freon standard relieved it of responsibility for alleged violations of the statute's

general duty clause. This raises two fundamental principles. The first concerns the power of an agency to make law. Without such power OSHA could not prescribe a regulation that preempts an otherwise applicable statutory provision. The second concerns the relationship between such agency-made law and statutory law. Treaties aside, the Supremacy Clause provides that a federal statute must always be superior to all other forms of law, including regulations. U.S. Const. art. VI..

These principles are implicated in the issue before us because OSHA's freon standard could preempt section 5(a)(1) only if Congress, the repository of all legislative power, U.S. Const. art. I, § 1, and supreme lawmaker, U.S. Const. art. VI, permitted it. Because Congress may delegate its legislative power, *see Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 865-66 (1984), the question in this case is whether OSHA has been delegated the power to issue regulations preempting an employer's duty under section 5(a)(1).

Neither petitioners nor General Dynamics approach this case as one directly involving a delegation issue. The Secretary relies entirely on his own regulation at 29 C.F.R. § 1910.5(f), and dictum in a decision of this court, *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1261 n.9 (D.C. Cir. 1973), for the proposition that section 5(a)(1) "does not apply with respect to any 'condition . . .' covered by the [OSHA] standard." Brief for Secretary at 21. The UAW agrees that "to preempt a general duty clause citation a specific standard must address the particular hazard cited under the general duty clause," Brief for UAW at 23, and refers to the inapposite holding of *L.R. Willson and Sons v. OSHRC*, 698 F.2d 507, 511 (D.C. Cir. 1983) (concerning preemption of a general *regulatory* standard). Brief for UAW at 21. Rather than questioning the Commission's apparent premise that a specific standard will be given preemptive effect

even when an employer knows it to be inadequate, petitioners rely instead on their argument that the hazard alleged in the statutory charge is distinguishable from that to which the specific standard is addressed. Nevertheless, as all the parties accept that premise, we believe it necessary to place it in proper focus.

We cannot address the relationship between section 5(a)(1) and the regulations issued under section 6 without turning at the outset to the statutory basis for those regulations. Neither can we decide whether the Secretary or the Commission deserves our deference without reference to what Congress has said on the matter.

We consider first whether the ALJ's analysis of the legislative history and policy of the Act, and his invocation of a rule of statutory construction, identify any congressional delegation of authority to preempt a duty under section 5(a)(1) with a specific standard. We then examine the effect of OSHA's preemption regulations. Subsequently we consider concretely the role of section 5(a)(1) in this case as it relates to section 5(a)(2). We end with the Secretary's argument that the final order is in violation of Commission precedent.

B. *Preemptive Effect of the OSHA Standard*

The Commission's adjudicative duties are distinct from OSHA's rulemaking function. *Compare* 29 U.S.C. § 655 (1982) (Secretary's authority to promulgate standards) *with* § 661(j) (1982) (Commission's adjudicative duties). There is no challenge before us to any OSHA regulation, but rather a challenge to the Commission's interpretation of particular OSHA regulations.

The Secretary argues that, "contrary to General Dynamics' unsupported assertion, section 1910.1000 was never intended to comprehensively cover all possible hazards or protective measures that could be associated with exposure to any of the numerous substances listed in the

standard," and that General Dynamics' argument "would defeat Congress' clear intent." Reply Brief for Secretary at 6-7. For guidance in this matter, we turn to *Chevron*. There the Supreme Court held that where a statute entrusted to an agency for administration is unclear, federal courts must defer to the agency's "permissible construction." 467 U.S. at 844-45. In the course of reaching its holding, the *Chevron* Court set out the approach federal courts must take when interpreting statutes:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, . . . the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-43 (citations omitted).

The Supreme Court recently reemphasized the dispositive effect of statutory language whose meaning is unmistakable. In *Board of Governors of the Fed. Reserve Sys. v. Dimension Financial Corp.*, 106 S. Ct. 681 (1986), the Court unanimously held (without Justice White's participation) that the Board of Governors lacked the authority to regulate "nonbank banks" because "[i]f the statute is clear and unambiguous, 'that is the end of the matter, for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Id.* at 686 (quoting dictum in *Chevron*, 467 U.S. at 842-43).

Applying this approach, our inquiry stops at the first step. Although some will find ambiguity even in a "No Smoking" sign, we find none in the language before us.

Because we find the language clear, we do not reach the issue of deference. Section 5(a)(1) clearly and unambiguously imposes on an employer a general duty to provide for the safety of his employees that is distinct and separate from the employer's duty, under section 5(a)(2), to comply with administrative safety standards promulgated under section 6 of the Act. Therefore, unless we find this interpretation in conflict with another source of statutory law, we are bound to reject any agency interpretation that is inconsistent with what we find to be the plain meaning of section 5(a).

Neither the Commission nor General Dynamics has cited such a source, and we have found none. The best the ALJ is able to do is cite the "declared purpose of the Act" as reflected in a sentence from a Senate committee report. *See* Final Order at 10, J.A. at 117. An appeal to legislative history is unavailing, however, where the meaning of a statute is manifest. As the Court noted in *Dimensions*,

> the final language of the legislation may reflect hard fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

106 S. Ct. at 689.

The ALJ's opinion also refers to the general principle of statutory construction that the specific takes precedence over the general as a basis for preemption. General Dynamics urges us to accept this reasoning, noting that the principle is contained in the maxim *expressio unius est exclusio alterius*. Brief for Respondent General Dynamics at 59-60 (citing *S & H Riggers and Erectors, Inc. v. OSHRC*, 659 F.2d 1273, 1280 n.9 (5th Cir. 1981) ("[A]n employer might, consistently with the principle *expressio unius est exclusio alterius*, conclude

that the variety of regulations requiring safety belts in specific situations represented an exclusive listing of the circumstances in which safety belts are required rather than indicating a general need for safety belts for all employees working at heights.") (dictum)). First, this maxim can apply only if we assume *a priori* that the specific standard is exclusive of the general duty of the Act. More important, however, we cannot defeat clear and unambiguous statutory language with a Latin maxim anymore than we can with legislative history.

We conclude that the Act does not empower the Secretary, and hence OSHA, to absolve employers who observe specific standards from duties otherwise imposed on them by the general duty clause. To the degree that the final order makes such a claim, it is in error.

C. *Preemption Regulations*

The final order also relies on an OSHA preemption regulation, 29 C.F.R. § 1910.5(c)(1), which General Dynamics here supplements with another, namely, 29 C.F.R. § 1910.5(f). Section 1910.5(c)(1) provides:

> if a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process . . . .

Section 1910.5(f) provides:

> an employer who is in compliance with any standard in this part shall be deemed to be in compliance with the requirement of section 5(a)(1) of the Act, but only to the extent of the condition, practice, means, method, operation, or process covered by the standard.

First we note that the application of section 1910.5(c)(1) to this case is less than obvious. The regulation does not refer to section 5(a)(1), and its reference to an

otherwise applicable general standard has no necessary relationship to a statutory duty to protect employees from a recognized hazard. Although the Commission has applied the principle incorporated in section 1910.5(c)(1) in support of a decision setting aside a citation for a violation of the general duty clause, *Brisk Waterproofing Co.*, 73 OSAHRC 30/E1, 1 BNA OSHC 1263, 1973-74 CCH OSHD ¶ 15,392 (No. 1046, 1973), the language used in the case would more appropriately apply to section 1910.5(f), the regulation cited by General Dynamics in justifying its claim of preemption. While we believe that section 1910.5(f) may be read merely to prohibit a double penalty for an employer who has violated a safety standard, that is to say, one penalty under the safety standard and the other under the general duty clause, we now consider whether the Company's broader reading of this regulation is authorized by Congress.

Both preemption regulations were promulgated pursuant to OSHA's authority under section 6 of the Act, 29 U.S.C. § 655 (1982). Section 6 authorizes the Secretary to promulgate safety standards. It nowhere suggests that the Secretary may promulgate standards that displace the general duty imposed by section 5(a)(1). When we compare the lack of statutory support for the construction of sections 1910.5(c)(1) and (f) that the Commission and General Dynamics reach, and the clear and unambiguous language of the general duty clause, there is no contest. On the facts in this case, section 5(a)(1) can no more be denied legal effect on the basis of OSHA's preemption regulations than it can on the basis of its specific standard.

D. *The Role of Section 5(a)(1)*

Any apparent conflict between section 5(a)(2) or the preemption regulations on the one hand, and the general duty clause on the other, is resolved when one focuses on the words "recognized hazard" in section 5(a)(1).

As the Commission has pointed out in *Con Agra, Inc., McMillan Co. Division*, 1983-84 O.S.H. Dec. (CCH) ¶ 26,420, at 33,523 (1983):

> In order to establish a section 5(a)(1) violation, the Secretary must prove: (1) the employer failed to render its workplace free of a hazard, (2) *the hazard was recognized* either *by the cited employer* or generally within the employer's industry, (3) the hazard was causing or likely to cause death or serious physical harm, and (4) there was a feasible means by which the employer could have eliminated or materially reduced the hazard.

Id. at 33,526 (citations omitted) (emphasis added).

This analysis emphasizes the fact that the duty to protect employees is imposed on the employer, and the hazards against which he has the obligation to protect necessarily include those of which he has specific knowledge. Therefore if (as is alleged in this case) an employer knows a particular safety standard is inadequate to protect his workers against the specific hazard it is intended to address, or that the conditions in his place of employment are such that the safety standard will not adequately deal with the hazards to which his employees are exposed, he has a duty under section 5(a)(1) to take whatever measures may be required by the Act, over and above those mandated by the safety standard, to safeguard his workers. In sum, if an employer knows that a specific standard will not protect his workers against a particular hazard, his duty under section 5(a)(1) will not be discharged no matter how faithfully he observes that standard. Scienter is the key.

By the same token, absent such knowledge, an employer may rely on his compliance with a safety standard to absolve him from liability for any injury actually suffered by employees as a consequence of a hazard the standard was intended to address, and he will be deemed to have met his obligation under the general duty clause

with respect thereto. In other words, compliance with a safety standard will not relieve an employer of his duty under section 5(a)(1); rather, it satisfies that duty. It is in this sense that it may be said that an OSHA standard preempts obligations under the general duty clause.

Thus a decision in the case at hand depends on the following factual determinations: Is the hazard alleged in the statutory charge accurately described? If so, is it adequately addressed by the freon standard? And if it is not, did General Dynamics have knowledge of the fact and take appropriate measures to mitigate the hazard? We do not have the answers because, having decided that "the allegations of the violation [of the general duty clause] are inappropriate and must be vacated because the alleged hazard is addressed by a specific standard," ALJ decision at 10, J.A. at 117, the ALJ declined to address the basic questions. Although General Dynamics recognized that certain uses of the solvent inside tracked vehicles could cause serious harm to employees, J.A. at 1006, the ALJ has not determined whether it believed that its observance of the freon standard was sufficient to protect them from that harm.

One thing we can conclude is that the hazard alleged in the statutory charge is distinguishable from that addressed by the freon standard. The hazard is described as follows:

> Employees working in the Heavy Repair, Test and Adjust, Marriage, M-1 Hull Line, and Engine Test areas were required to spray or pour varying quantities of 1,1,2 trichloro 1,2,2 trifluoroethane into the turret, driver's, and engine compartments of M-1 tanks and immediately enter these compartments to perform clean-up and other routine tasks thereby exposing themselves to the hazard of asphyxiation and/or chemical poisoning. A confined space entry procedure, specific for these operations, had not been im-

plemented when toxic compounds were introduced into the vehicles.

Citation at 1; J.A. at 7. The citation also lists the minimum requirements of the "confined space entry procedure." Citation at 1-2; J.A. at 7-8.

The occupational hazard described by that language is clearly distinct from the one addressed by 29 C.F.R. § 1910.1000(a). While the regulation places a limit on the permissible level of time-weighted exposure to freon vapors over an eight-hour work shift, the hazard described in the citation is both broader and more specific than that described in the regulation. The citation refers to the danger, in confined spaces requiring special entry procedures, of short-term exposure to toxic vapors in concentrations that may displace oxygen. Given the facts alleged, the ALJ should have determined whether the description of the hazard was accurate; and if so, whether General Dynamics had knowledge of the hazard.

E. *Commission Adherence to Precedent*

Petitioners offer the additional argument that the Commission's order is arbitrary and capricious because it departs from the Commission's decision in *Con Agra*. In that case the Secretary had issued a citation against a grain elevator company whose employees regularly entered grain-laden railroad cars containing pesticide fumes. Employees sometimes tested the air inside these cars by simply smelling for fumes, but the Secretary argued that certain pesticide vapors can cause serious harm at concentrations below those detectable by smell. The employer, Con Agra, Inc., argued that "there is nothing in the OSHA regulations that requires all grain cars to be tested, and that it was aware of and in compliance with section 1910.1000 threshold limits for air contaminants." *Id.* at 33,527. The ALJ granted Con Agra's motion to dismiss.

On review, the Commission adhered to the position that a specific standard preempts the general duty clause of the Act. It deemed that proposition irrelevant, however, and concluded that "failure to test in a confined atmosphere before possible exposure of employees to toxic substances is a violation distinct from a continued exposure to known quantities of substances listed in section 1910.1000." *Id.* It therefore held that the ALJ "erred in granting Con Agra's motion to dismiss at the close of the Secretary's case," vacated the ALJ's decision, and remanded the case. *Id.* at 33,528.

We cannot discern any material difference between the circumstances alleged in this case and those in *Con Agra.* According to the statutory charge, General Dynamics sent its employees into tanks, tank hulls, and assembly-line pits that contained solvent vapors. Con Agra sent its employees into railroad cars that contained pesticide fumes. Like Con Agra, General Dynamics argues that no reliable technical measurements show that its practices exposed its employees to fumes at concentrations higher than those prescribed by regulation. In *Con Agra,* the Commission deemed such an argument irrelevant because the employer had actual knowledge of the hazard faced by employees who entered contaminated railroad cars. In the instant case, the Secretary "strongly contends that the respondent had actual knowledge of the hazards associated with employee entry into confined spaces." ALJ decision at 9; J.A. at 116. In each case, there is no evidence that the contaminants exceeded the levels permitted by the specific standard.

Nor are we persuaded by the Commission's argument that this case is distinguishable from *Con Agra* because subsection 1910.1000(e) of the regulations adequately addresses the special measures required to safeguard employees working in confined spaces. That subsection mandates, *inter alia,* such "protective equipment or any other protective measures [necessary] to keep the exposure of

employees to air contaminants within the limits prescribed." As the Secretary points out, however, the regulation is addressed not to the conditions here alleged, but to the measures that may be necessary to meet the time-weighted limits established by subsection 1910.1000 (a). Reply Brief for Secretary at 8.

More fundamental, *Con Agra* cannot be so easily distinguished because its holding is not confined by a focus on the particular facts about challenged employer practices. Rather, *Con Agra* correctly makes the larger point that when an employer is aware of a hazard that is not in fact addressed by a specific standard, then of necessity that standard cannot be deemed to have preempted his obligation under the general duty clause. In this case the issue whether M-1 tanks, hulls, and assembly-line pits had been ventilated could be relevant to the outcome of a section 5(a)(1) adjudication, but not to whether such an adjudication need be made at all.

Thus we conclude that the Commission has failed to explain adequately why it did not follow its holding in *Con Agra*.

III. Conclusion

We hold that that part of the Commission's final order vacating the statutory charge (1) is not in accordance with law because it impermissibly construes regulations in a manner unauthorized by the clear and unambiguous language of the Act, and (2) is arbitrary and capricious because it inadequately explains the Commission's failure to follow the holding of *Con Agra*. We therefore grant both petitions for review, vacate that part of the Commission's final order that vacates the section 5(a)(1) portion of the citation, and remand the cases to the Commission with instructions to address the merits of the section 5(a)(1) citation.

It is so ordered.

APPENDIX F

Appendix F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1760 September Term, 1986

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*

v.

GENERAL DYNAMICS LAND SYSTEMS DIVISION AND CONSOLIDATED CASE NO. 85-1826

BEFORE: STARR and BUCKLEY, *Circuit Judges;* AUBREY ROBINSON*, *Chief Judge,* U.S District Court for the District of Columbia

ORDER

FILED June 18, 1987

Upon consideration of respondent General Dynamics Land Systems Division's petition for rehearing, filed May 29, 1987, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, *CLERK*

BY: (s) Robert A. Bonner
Deputy Clerk

* Sitting by designation pursuant to 28 U.S.C. Section 292(a).

Appendix F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1760 September Term, 1986

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*

v.

GENERAL DYNAMICS LAND SYSTEMS DIVISION AND CONSOLIDATED CASE NO. 85-1826

BEFORE: Wald, *Chief Judge;* Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D.H. Ginsburg, *Circuit Judges;* Aubrey Robinson*, *Chief Judge,* U.S. District Court for the District of Columbia

ORDER

FILED JUNE 18, 1987

Respondent General Dynamics Land Systems Division's suggestion for rehearing *en banc* has been circulated to the full court. No member of the court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc,* that the suggestion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, *CLERK*

BY: (s) Robert A. Bonner
Deputy Clerk

*Sitting by designation pursuant to 28 U.S.C. Section 292(a).

Supreme Court, U.S.
FILED
SEP 25 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-260

In The

Supreme Court of the United States

October Term, 1987

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,
v.
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA AND ITS LOCAL 1200,
Respondents.

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,
v.
WILLIAM E. BROCK, SECRETARY OF LABOR AND OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

DOES A UNITED STATES COURT OF APPEALS ACT OUTSIDE OF ITS AUTHORITY WHEN IT CONSTRUES A STATUTE AND DETERMINES THAT THE AGENCY THAT ADMINISTERS THE STATUTE DID SO IMPROPERLY WHEN IT INTERPRETED AN AGENCY REGULATION SO AS TO NULLIFY A CLEAR AND UNAMBIGUOUS STATUTORY PROVISION?

II.

DOES A UNITED STATES COURT OF APPEALS ERR WHEN IT DECLINES TO DEFER TO AN ADMINISTRATIVE AGENCY DECISION WHERE THE AGENCY, WITHOUT ADEQUATE EXPLANATION, DEVIATES FROM ITS OWN PRECEDENT?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
INDEX OF AUTHORITIES	iii
OPINION BELOW	1
COUNTER-STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	4
I. THERE IS NO CONFLICT BETWEEN CIRCUITS.	5
II. THE PETITION PRESENTS NO FEDERAL LAW QUESTION SUFFICIENTLY IMPORTANT TO JUSTIFY GRANTING A WRIT OF CERTIORARI.	6
A. The Circuit Court Decision Does Not Raise The Issue Of Preemption. Rather, It Addresses The Issue Of Statutory Construction By An Administrative Agency.	7
B. The Court Of Appeals Properly Characterized The Commission's Decision As Arbitrary And Capricious.	10
CONCLUSION	12

INDEX OF AUTHORITIES

CASES:

Board of Governors v. *Dimension Financial Corp.*, 106 S.Ct. 681 (1986)	8
Brennan v. *Butler Lime and Cement Company*, 520 F.2d 1011 (7th Cir. 1975)	5, 6

Page

Con Agra, Inc., McMillan Company Division, 1983-84 O.S.H. Dec. (CCH) ¶ 26,420 11 OSHC (BNA) 1145 10-11

Federal Maritime Commission v. *Seatrain Lines*, 411 U.S. 726 (1973) 8

FTC v. *Colgate-Palmolive*, 380 U.S. 374 (1965) 8

Gulf States Utilities v. *FPC*, 411 U.S. 747 (1973) 11

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, et al. v. *General Dynamics*, 815 F.2d 1570 (D.C. Cir., April 14, 1987) 1-2, 3, 4, 7, 8, 9, 10, 11

National Realty and Construction Company, Inc. v. *OSHR 1973)* 6

NLRB v. *Babcock & Wilcox*, 351 U.S. 105 (1956) 9

NLRB v. *Brown*, 380 U.S. 278 (1965) 8-9

Usery v. *Marquette Cement Mfg. Co.*, 568 F.2d 902 (2nd Cir. 1977) 5

Volkswagenwerk v. *FMC*, 390 U.S. 261 (1968) 8

STATUTES AND REGULATIONS:

29 C.F.R. § 1910.1000(a)(2) 2

29 C.F.R. § 1910.1000(e) 2

29 C.F.R. § 1910.5(f) 2, 5, 6, 8

29 U.S.C. § 654(a)1 (§ 5(a)1 of CSHA "General Duty Clause") 2, 4, 9, 10

29 U.S.C. § 654(a)2 2

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GENERAL DYNAMICS LAND SYSTEMS, INC.,
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR UAW AND ITS LOCAL 1200

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and its Local 1200 [1], by counsel respectfully pray that the Court deny the Petition for Writ of Certiorari.

OPINION BELOW

The opinion below is reported at: *International Union, United Automobile, Aerospace and Agricultural Implement*

[1] Hereafter, jointly "UAW" or "Union".

Workers of America, et al. v. *General Dynamics*, 815 F.2d 1570 (D.C. Cir., April 14, 1987).

COUNTER-STATEMENT OF THE CASE

OSHA's "general duty clause" requires an employer to furnish each of its employees employment and a place of employment free from recognized hazards that cause or may cause an employee death or serious physical harm, § 5(a)1, 29 U.S.C. § 654(a)1. (Pet. 3). An employer is also required to comply with health and safety standards administratively promulgated by the Secretary of Labor. 29 U.S.C. § 654(a)2 (Pet. 3).

The Secretary has promulgated a specific safety standard governing an employee's eight-hour time weighted average exposure to the solvent "freon".[2] 29 C.F.R. §§ 1910.1000(a)(2) & (e) (Pet. App. B-18).The Secretary has also promulgated a regulation which deems an employer who is in compliance with an administrative safety standard to be in compliance with the general duty clause, but only to the extent the standard covers the safety condition, practice, means, method, operation or process. 29 C.F.R. § 1910.5(f). (Pet. 3).

In August 1982, General Dynamics instituted the use of freon as a solvent to clean up oil spills that occurred during its manufacture of M-1 Abrams tanks at the Detroit Arsenal Tank Plant, a Department of Defense facility.

Freon is a hazardous substance. Although less toxic than other commercial solvents, it evaporates quickly. In its gaseous state it is heavier than air and may cause serious illness or death. It tends to accumulate in

---

[2] Chemical disposition – 1,1,2 - Trichloro 1,2,2 - Trifluoroethane.

assembly-line pits and tank hulls, displacing oxygen and creating a risk of asphyxiation. In high concentrations it may also cause cardiac arrythmia and eventual arrest. 815 F.2d at 1571 (Pet. App. E-3).

Between August 1982 and November 13, 1983, numerous incidents were observed involving serious adverse employee reactions and symptoms during their use of and exposure to freon. One employee was overcome by fumes in August 1982 after entering an assembly-line pit containing freon vapors. 815 F.2d at 1572 (Pet. App. E-4). In March of 1983 another employee became dizzy and weak after driving a fully assembled tank in which freon had been poured. *Id.* at 1572 (Pet. App. E-5). A third employee became seriously ill and lost consciousness in the presence of a supervisor at the Plant's test track while sitting inside the driver's compartment of a tank after several gallons of solvent had been poured into its body. On September 21, 1983 an employee who was exposed to freon fumes when he entered a tank after pouring in approximately two gallons of solvent to clean a hydraulic leak was discovered by a fellow employee shaking and foaming from the mouth. In November 1983, yet another employee at a different General Dynamics plant died from exposure to solvent fumes. *Id.* at 1572, 1573 (Pet. App. E-4–E-6).

General Dynamics was cited by the Secretary for violation of the OSHA general duty clause and OSHA's specific standard governing employee exposure to freon on November 29, 1983. (Pet. App. A-1). The citation alleged, *inter alia*, that General Dynamics "did not furnish employment and a place of employment which were free from recognized hazards associated with exposure to solvent vapors in confined spaces requiring special entry procedures". (Pet. App. A-2, E-6).

After an 18-day hearing contesting the citation, an OSHA ALJ declined to rule on the evidence bearing on the alleged § 5(a)1 *statutory* violation, and dismissed that charge reasoning that the *statutory charge* had to be vacated because the hazard alleged was addressed by a specific standard. (Pet. App. C-12, E-6–E- 7).

The ALJ also dismissed the alleged violation of the specific standard for insufficient proofs. (Pet. App. C-20). The ALJ decision became a final order of the Occupational Safety and Health Review Commission on September 23, 1985. (Pet. App. D-1). The Secretary's and the UAW's petitions for review were consolidated in the Court of Appeals for the D.C. Circuit. (Pet. App. E-7).

On review of the Commission's final order, the District of Columbia Circuit vacated that portion of the order which dismissed the statutory charge, holding that the Commission's decision "vacating the statutory charge is not in accordance with law because it impermissibly construes regulations in a manner unauthorized by the clear and unambiguous language of the Act, and is arbitrary and capricious because it inadequately explains the Commission's failure to follow the holding of *Con Agra*". 815 F.2d 1570, 1579 (D.C. Cir 1987) (Pet. App. E-1–E-19). General Dynamics' Petition for Rehearing was denied *en banc* on June 18, 1987. (Pet. App. F-2).

REASONS FOR DENYING THE WRIT

Petitioner presents two questions for review. Both questions essentially challenge the Court of Appeals' authority to rule as it did. They may be restated, i.e., (1) Did the D.C. Circuit act without authority when it determined that the Commission was not authorized by statute to vacate the statutory charge of a general duty violation because a specific standard arguably addressed

the same hazard; and (2) Did the D.C. Circuit fail to give proper deference to the Commission's decision to vacate the statutory charge. General Dynamics argues both of their issues on the premise that the Secretary's regulation, 29 C.F.R. § 1910.5(f), and the Commission's interpretation of same, preempt an employer's general duty as specified in the statute.

General Dynamics has failed to demonstrate by its petition why this Court should exercise its discretion to review the decision below on either issue. While suggesting that the decision is both in conflict with those of other circuit courts (Pet. 9) *and* is of great public importance (Pet. 8), they fail to demonstrate that either is the case.

I.

THERE IS NO CONFLICT BETWEEN CIRCUITS.

Even if we accepted petitioner's assertion that the court below struck down the Secretary's preemption regulation (Pet. 8), which we do not, General Dynamics' conflict of circuits argument is totally lacking in substance. The three (3) relevant court of appeals decisions they cite are wholly inapposite. (Pet. 9). In neither of them was the question of preemption of the general duty clause by an OSHA regulation an issue before the reviewing Court, and neither of them ruled directly or indirectly on the issue.

In *Usery* v. *Marquette Cement Mfg. Co.*, 568 F.2d 902, 909 (2nd Cir. 1977), the court held that the Commission erred when it refused to allow the Secretary to amend the Complaint to charge the employer with a violation of the general duty clause in addition to a specific standard violation. *Brennan* v. *Butler Lime and Cement Company*, 520 F.2d 1011 (7th Cir. 1975) set aside a Commission decision

that vacated the Secretary's citation that was based only on an alleged violation of a specific standard under § 5(a)2 of the Act. *National Realty and Construction Company, Inc.* v. *OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973) reversed a Commission finding of a violation of the general duty clause because the record lacked substantial evidence of a violation.[3]

II.

THE PETITION PRESENTS NO FEDERAL LAW QUESTION SUFFICIENTLY IMPORTANT TO JUSTIFY GRANTING A WRIT OF CERTIORARI.

The decision below is scarcely of such public importance as General Dynamics maintains. To be sure, it leaves open the possibility that General Dynamics, on remand, could be found in violation of the OSHA general duty clause and thus expose certain General Dynamics' safety violations to public awareness. But that possibility merely leaves us with a routine judgment, vacating and remanding an administrative order with further instructions.

> We hold that part of the Commission's final order vacating the statutory charge (1) is not in accordance with law because it impermissibly

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[3] Admittedly, both *Butler*, 520 F.2d 1017 n 9, and *National Realty*, 489 F.2d 1261 n 9, refer in dicta to the preemption regulation, 29 C.F.R. 1910.5(f). Neither of them rely on an interpretation of that regulation in the respective decisions. *Butler* simply cites *National Realty* without analysis. *National Realty* refers to the regulation for the proposition that specific standards preempt the general duty clause but, as in *Butler*, does not apply it to the decision. Even if it had, *National Realty*, being a decision from the same circuit as the decision below, does not satisfy the inter-circuit conflict normally deemed appropriate for grants of certiorari. As to the resulting potential for intra-circuit conflict, if any, General Dynamics' allegation of that was rejected below by the circuit, *en banc*. (See General Dynamics' D.C. Circuit Petition for Rehearing, p. 3; Pet. App. F-2).

> construes regulations in a manner unauthorized by the clear and unambiguous language of the Act, and (2) is arbitrary and capricious because it inadequately explains the Commission's failure to follow the holding of *Con Agra*. We therefore grant both petitions for review, vacate that part of the Commission's final order that vacates the section 5(a)(1) portion of the citation, and remand the cases to the Commission with instructions to address the merits of the section 5(a)(1) citation. [815 F.2d at 1579 (Pet. App. E-19)].

The decision itself raises no obviously important public issues.[4] It is not an erroneous statutory interpretation in conflict with existing Supreme Court precedent, and petitioner makes no such claim. It is, in fact, a decision on a point of law well-settled by this Court. Yet General Dynamics' principal argument is that the decision improperly struck down the Secretary's preemption regulation. We discuss the decision.

A. The Circuit Court Decision Does Not Raise The Issue Of Preemption. Rather, It Addresses The Issue Of Statutory Construction By An Administrative Agency.

Contrary to General Dynamics' assertion, the Circuit Court did not rule on the preemptive force of the Secretary's specific standard or the preemption regu-

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[4] If found in violation, General Dynamics faces having to pay a modest fine. Had they been found guilty of both the statutory and the specific standard charges they might have paid $18,000. No other entity that uses freon in the same or similar way as General Dynamics has been identified by them so as to be directly affected by this decision. It is further our understanding that General Dynamics has discontinued the use of freon for tank cleaning purposes.

lation.[5] It did not have to. The circuit addressed the more basic issue of statutory construction and the legislative delegation of authority to the Secretary to promulgate rules inconsistent with the statutory command. It properly found such authority non-existent. 815 F.2d at 1576, 1577 (Pet. App. E-9).

Citing *Board of Governors* v. *Dimension Financial Corp.*, 106 S.Ct. 681 (1986), for the proper role of courts and administrative agencies when the meaning of statutory language is unmistakable, the D.C. Circuit says:

> if the statute is clear and unambiguous, that is the end of the matter, for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. [*Id.* at 686 (Pet. App. E-11)].

It is well settled that courts are the final authority on issues of statutory construction. *Federal Maritime Commission* v. *Seatrain Lines*, 411 U.S. 726, 745 (1973); *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 272 (1968); *FTC* v. *Colgate-Palmolive*, 380 U.S. 374 (1965). They "are not obliged to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully

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[5] General Dynamics' suggestion that the Secretary's long-standing regulation, 29 C.F.R. § 1910.5(f) was struck down by the decision below is mere fancy. The court specifically notes that there "is no challenge before us to any OSHA regulation, but rather a challenge to the Commission's interpretation of particular OSHA regulations." 815 F.2d 1575 (Pet. App. E-10).

Moreover, nothing in the language of 29 C.F.R. § 1910.5(f) specifically refers to the word "preemption" or a modification thereof. Nor does the language authorize the use of a specific standard to relieve an employer of its general duty under OSHA. See Pet. p. 3.

review such administrative decisions". *NLRB* v. *Brown*, 380 U.S. 278, 291, 292 (1965). If the agency decision rests on an erroneous legal foundation, then courts must, of course, set them aside. *Id.* at 292, citing *NLRB* v. *Babcock & Wilcox*, 351 U.S. 105, 112, 113 (1956).

Here, the D.C. Circuit Panel's[6] examination of the Secretary's statutory authority to promulgate a rule that could abolish a statutory duty imposed by Congress on employers was not only proper but analytically necessary to reach a correct decision regarding the multiple positions of the parties asserted in the court below.[7] As that decision rightly concludes, "the Act does not empower the Secretary, and hence OSHA, to absolve employers who observe specific standards from duties otherwise imposed on them by the general duty clause". 815 F.2d at 1576 (Pet. App. E-13).

Judge Buckley reasoned that the unambiguous and expressed intent of Congress was to impose on employers a general duty for the safety of its employees under § 5(a)1 distinct from, and in addition to, the employer's duty to adhere to safety standards promulgated by the Secretary.

The decision emphasizes an employer's dual obligation under OSHA to comply with both the general statutory duty as well as specific standards promulgated by the

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[6] Decision by Buckley, J., joined by Starr, J. and Robinson, C.J. U.S. District Court District of Columbia, sitting by designation.

[7] General Dynamics argued for preemption of the general duty by a specific standard and that deference should be accorded to the Commission's preempted decision. The Secretary and the UAW asserted that the specific standard did not address the general duty violation alleged and thus could not preempt such duty. They also argued that greater deference should be accorded the Secretary's decision to determine when there was a violation of the general duty and its decision to pursue enforcement than that accorded to the Commission's interpretation of the preemption regulation and the effect of the specific standard. 815 F.2d at 1574 (Pet. App. E-9, E-10).

Secretary. Moreover, the court recognized the absence of any need to rule on the preemption issue when it noted that, because the intent of Congress regarding the meaning of § 5(a)1 was so clear, it did not reach the issue of *deference*[8] to an OSHA standard or the so-called preemption regulation. 815 F.2d at 1575 (Pet. App. E-12).

Whatever preemption issue might have been raised had the court plunged into a consideration of deference to the Commission's interpretation of the Secretary's preemption regulation was avoided by Judge Buckley's scrupulous attention to, and decision regarding, the Congressional delegation issue. The D.C. Circuit, *en banc*, unanimously agreed with Judge Buckley that the issue here raised by General Dynamics was undeserving of further review. While clearly not dispositive of this Court's discretion to review the challenged decision, it certainly *suggests* the absence of any issue of great importance.

B. The Court Of Appeals Properly Characterized The Commission's Decision As Arbitrary And Capricious.

The court below characterized the Commission's decision as arbitrary and capricious because it inadequately explained its failure to follow existing agency precedent in *Con Agra, Inc., McMillan Company Division*, 1983-84 O.S.H. Dec. (CCH) ¶ 26,420, 11 OSHC (BNA) 1145 (1983). The court noted that the Commission in *Con Agra* had concluded that the general duty violation therein alleged was not covered by a specific standard. The Commission in *Con Agra* concluded that

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[8] The preemption issue General Dynamics raises could legitimately exist only where there was a valid regulation that was challenged before the Court. As noted *supra*, n 4, there was no such preemption challenge.

> failure to test in a confined atmosphere before possible exposure of employees to toxic substances is a violation distinct from a continued exposure to known quantities of substances listed in section 1910.1000.

Thus, the Commission itself [in *Con Agra*] vacated an ALJ decision which had granted *Con Agra*'s motion to dismiss. 815 F.2d at 1578 (Pet. App E-17, E-18). Here, the Commission affirmed the ALJ.

Failing to discern any material difference between *Con Agra* and the circumstances of this case where General Dynamics was charged with sending its employees into tanks, tank hulls, and assembly-line pits that contained solvent vapors, it rejected the Commission's argument for distinguishing *Con Agra*. 815 F.2d at 1579 (Pet. App. E-19).

There is nothing novel or significant enough about this part of the lower court's decision to justify review. It is not at all unusual for a court, when reviewing an administrative decision, to reject that decision as arbitrary or capricious where the reasons for such a decision are inadequately explained. *Gulf States Utilities* v. *FPC*, 411 U.S. 747 (1973). Clearly, no issue sufficiently important to issue a writ is raised by this aspect of the decision.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari to the District of Columbia Circuit should be denied.

Respectfully submitted,

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(3)

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No. 87-260

In the Supreme Court of the United States

OCTOBER TERM, 1987

GENERAL DYNAMICS LAND SYSTEMS, INC., PETITIONER

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AND ITS LOCAL 1200, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether compliance with a safety and health standard setting an eight-hour time weighted exposure limit for a particular toxic compound (freon) relieves an employer of its general duty under the Occupational Safety and Health Act of 1970, 29 U.S.C. 654(a)(1), to maintain a workplace "free from recognized hazards * * * likely to cause * * * serious physical harm," with regard to the short-term exposure of employees to freon in confined spaces.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Brennan v. *Butler Lime & Cement Co.*, 520 F.2d 1011 (7th Cir. 1975)	8, 9
Brock v. *L. R. Willson & Sons, Inc.*, 773 F.2d 1377 (D.C. Cir. 1985)	8, 9
Con Agra, Inc., 11 O.S.H. Cas. (BNA) 1141 (1983)	4, 6, 9, 10
Donovan v. *Adams Steel Erection, Inc.*, 766 F.2d 804 (3d Cir. 1985)	9-10
Usery v. *Marquette Cement Mfg.*, 568 F.2d 902 (2d Cir. 1977)	8
Whirlpool Corp. v. *Marshall*, 445 U.S. 1 (1980)	7

Statutes and regulations:

Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*:	
§ 2(b), 29 U.S.C. 651(b)	1-2
§ 5(a)(1), 29 U.S.C. 654(a)(1)	2
§ 5(a)(2), 29 U.S.C. 654(a)(2)	2
§ 6(b), 29 U.S.C. 655(b)	2
29 C.F.R.:	
Section 1910.5(c)(1)	5
Section 1910.5(f)	5, 7, 8, 9
Section 1910.1000	2, 3, 9
Section 1910.1000(a)	9
Section 1910.1000(a)(2)	2
Table Z-1	2
Section 1910.1000(e)	9, 10

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OPINIONS BELOW

The opinion of the court appeals (Pet. App. E1-E19) is reported at 815 F.2d 1570. The opinion of the administrative law judge (Pet. App. C1-C22), and the final order of the Occupational Safety and Health Review Commission (Pet. App. D1), are unreported.

JURISDICTION

The judgment of the court of appeals was entered April 14, 1987. A timely petition for rehearing and suggestion for rehearing en banc was denied on June 18, 1987 (Pet. App. F1-F2). The petition for a writ of certiorari was filed on August 17, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Occupational Safety and Health Act of 1970 (OSH Act) seeks "to assure so far as possible * * * safe

and healthful working conditions" (29 U.S.C. 651(b)), by prohibiting two distinct categories of violations. The OSH Act requires, under its so-called "general duty clause," that "[e]ach employer * * * furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees" (29 U.S.C. 654(a)(1)). In addition, it requires employers to comply with specific occupational safety and health standards promulgated by the Secretary of Labor (29 U.S.C. 654(a)(2), 655(b)).

The Secretary has promulgated an occupational safety and health standard for certain toxic and hazardous air contaminants, including freon vapors (1,1,2-Trichloro 1,2,2-trifluoroethane). See 29 C.F.R. 1910.1000. Under this standard, employers must ensure that no employee's exposure to freon exceeds 1000 parts per million parts of air on a time weighted average for any eight-hour work period (29 C.F.R. 1910.1000(a)(2) and Table Z-1). The standard does not set any limits for short-term exposure to freon or for exposure to freon in confined spaces without special entry procedures (see *ibid.*).

2. Petitioner, General Dynamics Land Systems Division, manufactures M-1 Abrams battle tanks at a Department of Defense facility (Pet. App. E3). For over a year, petitioner had its employees use a freon solvent in cleaning up the spills that resulted during the assembly process of these tanks (*id.* at E3-E4). The solvent, however, tended to accumulate in confined spaces such as assembly line pits and tank hulls and, because it displaced oxygen, created a risk of asphyxiation, depression of the central nervous system, irregular heart beat, and even cardiac arrest for employees working in these areas (*id.* at E3). Thus, in August 1982, one of petitioner's employees was overcome by freon vapors after entering a tank assembly-line pit (*id.* at E4); in March 1983, another employee became dizzy

and weak after driving a fully assembled tank (*id.* at E5); in July 1983, yet another employee working inside a tank lost consciousness after several gallons of freon were poured onto the tank floor and the only exit from the tank was blocked (*ibid.*); and, in September 1983, still another employee was discovered inside the driver's compartment of a tank, unconscious and "shaking and foaming from the mouth" (*id.* at C5-C6, E6).

Following the September 1983 incident, respondent United Auto Workers filed a complaint with the Department of Labor (DOL) (Pet. App. E6). After conducting an investigation,[1] the DOL cited petitioner for violating the general duty clause of the OSH Act—by requiring employees to enter (without a specific confined space entry procedure) M-1 tank compartments after freon had been sprayed or poured into them, thereby exposing those employees to the hazard of asphyxiation and/or chemical poisoning (*id.* at A2-A6, E6). The DOL also cited petitioner for violating the Secretary's specific freon standard—by exposing the employee injured in the September 1983 incident to levels of freon in excess of the eight-hour time weighted average set forth in 29 C.F.R. 1910.1000 (Pet. App. A2-A7, E6).

3. An administrative law judge (ALJ) of the Occupational Safety and Health Review Commission (OSHRC) vacated both aspects of the citation (Pet. App. C1-C22). The ALJ refused to rule whether the Secretary's evidence supported the allegation that petitioner had violated the general duty clause of the statute (*id.* at C9). He reasoned that, "under the Act, a citation alleging violation of section 5(a)(1) [*i.e.*, the general duty clause,] is inappropriate if the hazard is addressed by a standard" (*id.* at C11) and

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[1] While the DOL was conducting its investigation, another employee of petitioner died from exposure to solvent fumes (Pet. App. E6).

that "the circumstances of this case are governed solely by the regulations at 29 C.F.R. 1910.1000(a)-(d) which set forth the limits of employee exposure to trichloro trifluoroethane" (*id.* at C12). The ALJ recognized (*id.* at C11) that, in *Con Agra, Inc.*, 11 O.S.H. Cas. (BNA) 1141, 1145 (1983), the OSHRC had held that "[t]he failure to test in a confined atmosphere before possible exposure of employees to toxic substances is a violation distinct from a continued exposure to known quantities of substances listed in section 1910.1000." But the ALJ concluded that "[t]he foregoing exception is not applicable," stating that the employee injured in the September 1983 incident had ventilated the tank, and that "the air contaminants standard deals fully and completely with the hazard at issue, which is employee use of trichloro trifluoroethane in production of the M1 tank" (Pet. App. C11). Finally, he held that the Secretary had failed to prove that the air contaminants standard had been violated (*id.* at C19-C20). The ALJ's decision was subsequently adopted as the OSHRC's final order, after no Commissioner called for a further review of the decision (*id.* at D1).

4. The court of appeals vacated the OSHRC's order dismissing the general duty clause aspect of the citation (Pet. App. E1-E19). The court identified the question for decision as "whether, as a matter of law, [petitioner's] compliance with the freon standard relieved it of responsibility for alleged violations of the statute's general duty clause" (*id.* at E8-E9). It emphasized (*id.* at E10) that the case did *not* involve a challenge "to any [Occupational Safety and Health Administration (OSHA)] regulation, but rather a challenge to the [OSHRC's] interpretation of particular OSHA regulations." The court then held that OSHRC had "erred in its construction of OSHA's regulations" and, in the alternative, that OSHRC had "acted arbitrarily and capriciously in refusing to follow its own precedent" (*id.* at E8).

The court began by noting that "Section 5(a)(1) [of the OSH Act] clearly [and unambiguously] imposes on an employer a general duty to provide for the safety of his employees that is distinct and separate from the employer's duty, under section 5(a)(2), to comply with [the] administrative safety standards promulgated under section 6 of the Act" (Pet. App. E12). Thus, the court said (*id.* at E13-E14) that "the Act does not empower the Secretary, and hence OSHA, to absolve employers who observe specific standards from duties otherwise imposed on them by the general duty clause." Construing the language of 29 C.F.R. 1910.5(f) (Pet. App. E12), which provides that an employer in compliance with a specific OSHA standard "shall be deemed to be in compliance" with the "general duty clause," "but only to the extent of the condition, practice, means, method, operation, or process covered by the standard," the court disagreed with the ALJ's conclusion that 29 C.F.R. 1910.5(f) relieved petitioner of its duty to provide a workplace free from recognized hazards.[2]

Rather, the court found that "[a]ny apparent conflict between section 5(a)(2) or the preemption regulations on the one hand, and the general duty clause on the other, is resolved when one focuses on the words 'recognized hazard' in section 5(a)(1)" (Pet. App. E14). These words, it said, indicate that, "if an employer knows that a specific standard will not protect [its] workers against a particular hazard, his duty under section 5(a)(1) will not be discharged no matter how faithfully he observes that standard" (*id.* at E15).

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[2] For the same reason, the court also rejected petitioner's argument (Pet. App. E13-E14) that it was relieved of its responsibilities under the general duty clause by another of the Secretary's regulations, 29 C.F.R. 1910.5(c)(1), which provides that a standard "specifically applicable to a condition, practice, means, method, operation, or proc-

The court then undertook tc determine whether petitioner had knowledge that its alleged observance of the freon standard would not protect its workers against the cited hazards (Pet. App. E14-E15). The court was unable to do so, however, since the ALJ had held that the cited hazards were addressed by the specific standard (*id.* at E16). The court disagreed with the ALJ, noting that, "[w]hile the regulation places a limit on the permissible level of time-weighted exposure to freon vapors over an eight-hour work shift, the hazard described in the citation * * * refers to the danger, in confined spaces requiring special entry procedures, of short-term exposure to toxic vapors in concentrations that may displace oxygen" (*id.* at E17). Accordingly, the court concluded that "the ALJ should have determined whether the description of the hazard was accurate; and, if so, whether [petitioner] had knowledge of the hazard" (*ibid.*).

In the alternative, the court held (Pet. App. E17-E19) that the ALJ had failed adequately to explain why it did not follow the OSHRC's holding in *Con Agra*. The court could not "discern any material difference between the circumstances alleged in this case and those in *Con Agra*" (*id.* at E18). Nor did it believe that *Con Agra* could be so easily distinguished, noting that "its holding is not confined by a focus on the particular facts about challenged employer practices" (*id.* at E19). Rather, the court said, "*Con Agra* correctly makes the larger point that[,] when an employer is aware of a hazard that is not in fact addressed by a specific standard, then of necessity that standard cannot be deemed to have preempted his obligation under the general duty clause" (*ibid.*).

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ess, * * * shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process * * *."

ARGUMENT

The court of appeals reached the correct result in this case. Its decision does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner first contends (Pet. 8-9, 11-20) that the decision below invalidates and effectively replaces 29 C.F.R. 1910.5(f) with a preemption regulation of the court's own devising. This contention is meritless.

a. The court of appeals plainly did not invalidate the Secretary's preemption regulation. The court stated quite explicitly (Pet. App. E10) that the case did *not* involve a challenge "to any OSHA regulation, but rather a challenge to the [OSHRC's] interpretation of particular OSHA regulations." Moreover, the court construed 29 C.F.R. 1910.5(f) in a way that resolved "[a]ny apparent conflict between section 5(a)(2) or the preemption regulations on the one hand, and the general duty clause on the other * * *" (Pet. App. E14). Thus, there is no basis for suggesting that 29 C.F.R. 1910.5(f) has been invalidated.

b. Nor did the court of appeals replace 29 C.F.R. 1910.5(f) with a preemption regulation of the court's own devising.[3] The preemption regulation applies only where compliance with a safety or health standard adequately addresses a particular hazard attributable to a specific substance. It does not alter the employer's statutory obligation to eliminate serious, recognized hazards from the workplace, which is "mandatory [and] independent of the specific health and safety standards to be promulgated by the Secretary" (*Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 13 (1980)).

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[3] Petitioner errs in suggesting (Pet. 9-10, 12 n.5, 13-14) that, in the proceedings below, the Secretary took the position that 29 C.F.R. 1910.5(f) allowed an employer to rely on an *inadequate* safety or health standard to defeat its obligations under the general duty clause. The Secretary took no such position.

c. In any event, even if the preemption regulation applies whenever a specific standard fails to provide adequate protection, the result below is still correct. 29 C.F.R. 1910.5(f) states that compliance with a specific standard "shall be deemed to be in compliance" with the general duty clause "only to the extent of the condition, practice, means, method, operation, or process covered by the standard." The court of appeals correctly found (Pet. App. E16) that "the hazard alleged in the statutory charge is distinguishable from that addressed by the freon standard." Specifically, it said (*id.* at E17) that, "[w]hile the regulation places a limit on the permissible level of time-weighted exposure to freon vapors over an eight-hour work shift, the hazard described in the citation is both broader and more specific than that described in the regulation."[4] Thus, under the plain language of the preemption regulation, it is clear that petitioner has not been relieved of its obligations under the general duty clause.[5]

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[4] The court's conclusion is plainly correct. In setting only a maximum, eight-hour, time weighted exposure limit, the freon standard addresses only the hazard of cumulative exposure to the substance over a normal work shift. It sets no short-term limit to protect against brief, sudden exposures to very high levels of freon, even though such levels may result in severe toxic reactions or may displace oxygen, creating a risk of asphyxiation or fatal cardiac arrest in confined spaces. See Pet. App. C20, E3. Thus, it is "unsupported and counterintuitive" (*Brock* v. *L.R. Willson & Sons, Inc.*, 773 F.2d 1377, 1382 (D.C. Cir. 1985)) to conclude, as the ALJ concluded (Pet. App. C11), that the freon standard deals "fully and completely" with the use of freon in petitioner's production of M1 tanks (*id.* at E16-E17).

[5] Petitioner errs in suggesting (Pet. 9, 13) that the decision below conflicts with the decisions of the Second Circuit in *Usery* v. *Marquette Cement Mfg.*, 568 F.2d 902 (1977), and the Seventh Circuit in *Brennan* v. *Butler Lime & Cement Co.*, 520 F.2d 1011, 1017 n.9 (1975). In *Marquette Cement Mfg.*, the court held that the OSHRC erred when it refused to allow the Secretary to amend the complaint to charge the employer with a violation of the general duty clause in

2. Petitioner next suggests (Pet. 9-10, 21-29) that the court below erred in holding that OSHRC acted arbitrarily and capriciously in failing to follow its *Con Agra* decision. Of course, this holding was an alternate ground for the decision below, and thus makes no difference to the outcome of this case. In any event, the holding is correct.

In *Con Agra*, the Secretary issued a citation against a grain elevator company whose employees regularly entered grain-laden railroad cars containing pesticide fumes. The employer responded that it was in compliance with 29 C.F.R. 1910.1000's limits on air contaminants. The OSHRC held that the "failure to test in a confined atmosphere before possible exposure of employees to toxic substances is a violation distinct from a continued exposure to known quantities of substances listed in section 1910.1000" (*Con Agra*, 11 O.S.H. Cas. (BNA) at 1145).

Petitioner suggests (Pet. 22-26) that *Con Agra* is distinguishable from the present case because petitioner here was cited for violating 29 C.F.R. 1900.1000(e). But that section merely prescribes protective measures for the limits established in 29 C.F.R. 1900.1000(a), a section that addresses only the hazards relating to weighted-average exposure to freon over an eight-hour work shift. Since 29 C.F.R. 1900.1000(a) does not apply to the dangers of entering confined spaces with potentially toxic atmospheres, neither can 29 C.F.R. 1900.1000(e). And 29 C.F.R. 1900.1000(a)'s silence with respect to such hazards cannot be treated as an intent to leave them unregulated. See, *e.g.*, *L.R. Willson*, 773 F.2d at 1382; *Donovan* v. *Adams Steel Erection, Inc.*, 766 F.2d 804, 810 (3d Cir.

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addition to a specific standard violation. In *Butler Lime*, the court set aside an OSHRC decision vacating a citation that was based on an alleged violation of a specific standard. Thus, neither of these decisions finds preemption based on an interpretation of 29 C.F.R. 1910.5(f).

1985). Thus, the fact that petitioner has been cited for violating 29 C.F.R. 1900.1000(e) is not a basis for distinguishing *Con Agra*.

Nor can *Con Agra* be distinguished (Pet. 26-29) on the ground that petitioner's tanks, unlike the railroad cars in *Con Agra*, are not confined spaces. The ALJ declined to rule on this issue (Pet. App. C9), and thus, as the court of appeals recognized (*id.* at E19), this is a factual question that must be addressed on remand.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 87-260

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA AND ITS LOCAL 1200,
Respondents.

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR AND OCCUPATIONAL SAFETY AND HEALTH COMMISSION,
Respondents.

PETITIONER'S REPLY BRIEF

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12 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. THE COURT OF APPEALS STRUCK DOWN THE SECRETARY OF LABOR'S REGULATION 1910.5(f)	2
II. NO PARTY DENIES THE CLEAR LEGISLATIVE HISTORY DEMONSTRATING THAT THE GENERAL DUTY CLAUSE WAS INTENDED BY CONGRESS TO BE PREEMPTED WHERE A SPECIFIC STANDARD COVERED THE RISK IN QUESTION.	4
III. THE FREON STANDARD, 29 C.F.R. § 1910.1000(a)-(d), (e), COVERS THE RISK TO THE FULL EXTENT CONTEMPLATED BY REGULATION 1910.5(f)	6
CONCLUSION	9

TABLE OF AUTHORITIES

Cases: Page

Brock v. L.R. Willson and Sons, Inc., 773 F.2d 1377 (D.C. Cir. 1985) 6, 7

Con Agra, Inc., McMillan Company Division, 1983 C.C.H. O.S.H.D., ¶ 26,420, p. 33,523, 11 OSHC (BNA) 1141 8

Donovan v. A.A. Beiro Construction Co., 746 F.2d 894 (D.C. Cir. 1984) 7-8

Donovan v. Castle and Cooke Foods, 692 F.2d 641 (9th Cir. 1982) 8

Todd's Shipyards Corp., 81 O.S.H.A.R.C. 69/A2, 9 B.N.A. O.S.H.C. 2031, 1981 C.C.H. O.S.H.D. ¶ 25,516 at p. 31,812 (Rev. Comm. 1981) 7

Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980) 4, 5

United States Statutes and Regulations:

29 U.S.C. § 654(a)(1) 2

29 C.F.R. § 1910.5(f) ..... passim

29 C.F.R. § 1910.1000(a)-(d), (e) 6, 7, 8

Other Authorities:

U.S. Code Congressional and Administrative News, 91st Congress, Second Session (1970), p. 5186 (S. Rep. 91-1282) 4, 5

H. R. Rep. No. 91-1765, 91st Congress, 2d Sess., 1970 .. 5

BNA Daily Labor Report, September 17, 1987 6

INTRODUCTION

On August 17, 1987, Petitioner, General Dynamics Land Systems, Inc. ("General Dynamics"), filed its Petition for a Writ of Certiorari in this matter. On or about September 24, 1987, Respondents the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 1200 (the "Union") filed their Brief in Opposition. On or about November 16, 1987, Respondent the United States Secretary of Labor (the "Secretary") filed his Brief in Opposition. General Dynamics submits this Reply Brief, pursuant to Supreme Court Rule 22.5, in response to arguments raised in Respondents' Briefs in Opposition.

ARGUMENT

I.

THE COURT OF APPEALS STRUCK DOWN THE SECRETARY OF LABOR'S REGULATION 1910.5(f).

While the Union's Brief in Opposition, *see* pp. 7-9, acknowledges the Court of Appeals's invalidation of Regulation 1910.5(f), the Secretary claims that the court did no such thing. *See* Secretary's Brief in Opposition, p. 7. The Secretary is in error. There can be no sensible reading of the Court of Appeals's decision other than that the court has struck down Regulation 1910.5(f).

The Regulation states that an employer in compliance with a specific standard promulgated by the Secretary for a given risk "*shall be deemed* to be in compliance with the requirement of Section 5(a)(1) of the Act . . ." 29 C.F.R. § 1910.5(f) (emphasis added). The Court of Appeals, however, found that Regulation 1910.5(f) was inconsistent with Section 5(a)(1) of OSHA, 29 U.S.C. § 654(a)(1). *See* Appendix E, pp. 13-16. In place of Regulation 1910.5(f), the Court of Appeals created its own regulation to address circumstances in which an employer might otherwise be subject to both the general duty clause and a specific standard covering the risk in question. *See* Appendix E, pp. 15-16. The court's new regulation, based on its reading of the Act, is that preemption depends upon the employer's state of mind or "scienter." App. E, p. 15.

When the Court of Appeals found that "the Act does not empower the Secretary, and hence OSHA, to absolve employers who observe specific standards from duties otherwise imposed on them by the general duty clause. . . .," Appendix E, p. 13, it invalidated Regulation 1910.5(f). Although the court described the purported conflict it perceived between the Act and the Secretary's preemption Regulation, Section 1910.5(f), as "any apparent" conflict, *id.* at 14, this cannot alter the nature of the court's decision. That decision was to replace the Secretary of Labor's preemption regulation with the court's own regulation

and thereby strike down and invalidate a U.S. administrative agency's at least equally reasonable interpretation of the Act. *See* Petition, pp. 15-16.

In addition to the irony of the Secretary of Labor defending the Court of Appeals's invalidation of the Secretary's own OSHA interpretative Regulation, it is ironic that the court would note and that the Secretary would emphasize, in his Brief in Opposition, the fact that this case did not involve a "challenge . . . to any OSHA regulation, but rather a challenge to the Commission's interpretation of particular OSHA regulations." *See* court's Opinion, Appendix E, p. 10; Secretary's Brief in Opposition, p. 7. This is precisely what makes the Court of Appeals's decision so startling. While every single party and agency in this case, and apparently every decision ever considering a general duty clause preemption issue, has accepted the validity of Regulation 1910.5(f), *see* Petition, pp. 13-14, the court itself in this case *sua sponte* challenged the Secretary's Regulation, and then proceeded to strike down such Regulation and replace it with a regulation of the court's own devising. Petitioner is confident that upon examination of the Court of Appeals's decision, this Court will find, whatever its ultimate evaluation, if any, of the lower court's decision, that the lower court did indeed strike down and replace the Secretary's Regulation.

II.

NO PARTY DENIES THE CLEAR LEGISLATIVE HISTORY DEMONSTRATING THAT THE GENERAL DUTY CLAUSE WAS INTENDED BY CONGRESS TO BE PREEMPTED WHERE A SPECIFIC STANDARD COVERED THE RISK IN QUESTION.

General Dynamics wishes to emphasize that a certain argument is *missing* from the Secretary and Union Briefs in Opposition. Neither Brief makes any claim that the legislative history of OSHA indicates in any way that a rule even remotely approximating the Court of Appeals's new "scienter" rule was intended by Congress when it passed the Act. Rather, as set out by General Dynamics in its Petition, the legislative history is absolutely clear that the general duty clause was intended to be preempted where the Secretary had promulgated a specific standard to address the risk in question. *See* Petition, pp. 16-18. Thus, the Secretary's Regulation, 29 C.F.R. § 1910.5(f), interpreting the Act as "deeming" or conclusively presuming employer compliance with the general duty clause where the employer has complied with a specific standard covering the risk, is perfectly in accord with the legislative history of the Act.

This legislative history[1] is crucial because the Act is *not* clear. *See* Petitioner's Brief, pp. 14-16. While the Court of

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[1]The Secretary's Brief quotes a decision of this Court, *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980), for the proposition that the general duty clause is "mandatory [and] independent of the specific health and safety standards promulgated by the Secretary." Secretary's Brief in Opp., p. 7 (bracketed material in quotation by Secretary). The decision in the *Whirlpool* case was that a regulation of the Secretary of Labor allowing an employee to choose not to perform an assigned task because of fear of injury was entitled to deference because such regulation could not "be said *not* to be a reasonable and supportable interpretation of the Act." 445 U.S. at 12-13 (emphasis added). Importantly, Senate Report No. 91-1282, a history of the Bill that became the final Act, which Senate Report was cited, *inter alia*, by this Court in *Whirlpool* regarding the legislative history of the general duty clause (the House version was not adopted), states explicitly:

> The general duty clause in this Bill would not be a general substitute for reliance on standards, but would simply enable the Secretary to ensure the protection of employees who are working under *special circumstances for which no standard has yet been adopted*.

(Footnote continued on next page)

Appeals states that it finds the Statute "clear" and thus disregards the legislative history, Appendix E, p. 12, the court never explains how it reaches this conclusion. This is troublesome because nowhere in the Act is it stated that the general duty clause applies even if a specific standard has been promulgated to cover the risk in question. Doubtless the Act was not "clear" on this point to the *Secretary of Labor,* who promulgated Regulation 1910.5(f). Neither the Union's nor the Secretary's Brief comes to the aid of the Court of Appeals in this regard. The Secretary and the Union can provide no such aid because this position is unsupportable. *See* Petitioner's Brief, pp. 14-16. Thus, this Court should examine and rely upon the legislative history of the Act, which demonstrates conclusively that Congressional intent was precisely contrary to the decision of the Court of Appeals and precisely in accord with the Secretary's Regulation 1910.5(f).

(Footnote continued from previous page)

Senate Report 91-1282, printed in *U.S. Code Congressional and Administrative News,* 91st Congress, Second Session (1970), p. 5186 (emphasis added) (cited in the same *Whirlpool* passage, *see* 445 U.S. at 12-13 and n.17). Thus, the very legislative history relied upon by this Court in its consideration of the general duty clause on a different issue overwhelmingly supports the interpretation of the Act set out in Regulation 1910.5(f), which Regulation was struck down here by the Court of Appeals. *See also* H.R. Rep. No. 91-1765, 91st Congress, 2d Sess., 1970, p. 22 (same statement of intent).

III.

THE FREON STANDARD, 29 C.F.R. § 1910.1000(a)-(d), (e), COVERS THE RISK TO THE FULL EXTENT CONTEMPLATED BY REGULATION 1910.5(f).

The Secretary's Brief in Opposition offers as a justification for the Court of Appeals's decision the claim that under Regulation 1910.5(f) the risk addressed in the Citation in this case, exposure to freon in an M-1 Tank, is distinct from the risk addressed by Regulation 1910.1000(a)-(e). See Secretary's Brief in Opposition, p. 8. Of course, in no case could this claim correct the court's action in *striking down* Regulation 1910.5(f). In any event, this claim by the Secretary is erroneous, as was determined by the Administrative Law Judge when he applied Regulation 1910.5(f) below.

With respect to the *quantity* of freon to which an employee may be exposed, the ALJ found that Section 1910.1000(a)'s 8 hour time weighted average limitation completely governed the risk of exposure. App. C, p. 12.[2] In addition, as the ALJ found and as was explicitly *conceded* by the Secretary in his Brief to the ALJ, *see* App. C, p. 12; quotation in Petition, p. 24, Section 1910.1000(e) already requires *qualitative* controls, e.g., *confined*

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[2]Unlike other substances covered by Regulation 1910.1000(a)-(d), e.g., carbon tetrachloride, the Secretary did not establish an even shorter term (such as five minute) elevated exposure "acceptable ceiling concentration" or still more elevated "acceptable maximum peak" for freon. *See* Section 1910.1000, Table Z-2, App. B, p. 20; *see also* Petition, p. 12 n.5. The Secretary did *not*, as in *Brock v. L.R. Willson & Sons, Inc.*, 773 F.2d 1377 (D.C. Cir. 1982) (cited by Secretary at p. 8 n.4 of Brief in Opp.), leave the particular risk unregulated. Rather, the Secretary established for freon a degree and nature of quantitative regulation, ie., the less stringent eight hour time weighted average, that the Secretary *now* claims is inadequate. Thus, it was extremely sensible and fair for the ALJ to conclude that General Dynamics' full compliance with the eight hour time weighted average limit (undisputed here) was compliance with a regulation that covered the risk under Section 1910.5(f). If the Secretary feels that more stringent regulation of freon exposure risk is necessary, he may *modify* the freon standard and establish for freon, e.g., a maximum peak or an acceptable ceiling concentration — which he has recently tightened for benzene (a substance also covered by Regulation 1910.1000). *See* BNA Daily Labor Report, September 17, 1987, p. A-6.

space entry procedures if such a tank is a confined space, to address the alleged overexposure hazard present during construction of an M-1 Abrams Tank.[3] Simply stated, there is no control implementable to address the hazard alleged in this case not already required, if necessary to abate the hazard, under Section 1000(e). *See Todd's Shipyards Corp.*, 81 O.S.H.A.R.C. 69/A2, 9 B.N.A. O.S.H.C. 2031, 2034, 1981 C.C.H. O.S.H.D. ¶ 25,516 at p. 31,812 (Rev. Comm. 1981). Thus, the ALJ correctly found that the quantitative and qualitative requirements of the freon regulations "covered" the risk. *See* App. C, p. 12. As a result, Petitioner's undisputed compliance with Section 1910.1000(a)-(e) requires that Petitioner "shall be deemed to be in compliance with the requirements" of the general duty clause. 29 C.F.R. § 1910.5(f).

This Court should conclude that its general rule of deference to an administrative agency applies with respect to the Review Commission and Administrative Law Judge's application of Regulation 1910.5(f) to the present circumstances. Because the Court of Appeals found the language of the Statute "clear," it did not reach the issue of whether deference to the Commission or to the Secretary of Labor was appropriate where their interpretations of a Regulation under the Act differed. App. E, p. 12. For a description of the split of authority on this issue, *see Brock v. L.R. Willson and Sons, Inc.*, 773 F.2d 1377, 1383, n.7 (D.C. Cir. 1985). Interestingly, the only decision, of which General Dynamics is aware, addressing the issue of which entity, as between the Secretary of Labor and an Occupational Safety and Health Review Commission Administrative Law Judge, a reviewing court should defer to on an interpretation under OSHA or its Regulations is a decision of the District of Columbia Circuit Court of Appeals. In *Donovan v. A.A. Beiro Construction Co.*, 746

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[3]The Secretary's statement at page 2 of his Brief in Opposition that the standard does not set "any limits" for exposure in confined spaces ignores both the *mandatory* qualitative requirements of Section 1000(e) and the fact that Section 1000(a) requires that time weighted exposure not exceed 1000 parts per million *anywhere*. The Regulation makes no exception for alleged or actual confined spaces. *See* 29 C.F.R. § 1910.1000(a), (e).

F.2d 894, 903-905 (D.C. Cir. 1984), the D.C. Circuit deferred to the ALJ's interpretation of the Secretary's Regulation (which ALJ interpretation was made a Final Order, as here, by the Review Commission), the court finding that it could not "say the ALJ's interpretation of the Regulation [was] unreasonable." 746 F.2d at 905. Given the sensibility of deferring "to the Commission's expertise in exercising the *independent* adjudicatory [i.e., not prosecutorial] function assigned to it by the Act," *Donovan v. Castle and Cooke Foods,* 692 F.2d 641, 646 (9th Cir. 1982) (emphasis and bracketed material added), this Court should reach a similar conclusion, should it find it necessary, in this case.[4]

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[4]Petitioner relies upon its Petition for Certiorari with respect to remaining issues, in particular issues relating to the Review Commission's decision in *Con Agra, Inc., McMillan Company Division,* 1983 C.C.H. O.S.H.D., ¶ 26,420, p. 33,523, 11 OSHC (BNA) 1141. Petitioner would state its disagreement here, however, with the Secretary's statement that the Administrative Law Judge declined to rule on the issue of whether an M-1 Tank was a confined space. *See* Secretary's Brief in Opposition, p. 10. As set out in Petitioner's Petition, *see* pp. 26-29 and ALJ's decision, Appendix C, pp. 9, 11, 22, *Con Agra* was found by the ALJ to be inapplicable because of the M-1 Tank's natural and mechanical ventilation. *See also* Petition, pp. 26-29, with respect to other items regarding findings of ALJ on confined space issues. The Secretary's contentions notwithstanding, the ALJ merely declined to rule on the general duty clause citation generally and did not so decline with respect to the confined space issue. Appendix C, p. 9. Rather, for the purposes of distinguishing *Con Agra,* the ALJ found that an M-1 Tank is not a confined space requiring special entry procedures. *See* Appendix C, pp. 9, 11; Petition, pp. 26-27.

As an additional final note, given the factual emphasis of the Union and Secretary's Briefs in Opposition, General Dynamics wishes that the Court be apprised of record facts explaining the alleged physical reaction of the employee in question, Charles Paling, to freon on the day of the incident in question. While the Union and the Secretary emphasize Paling's physical symptoms, they fail to acknowledge Paling's own testimony that he had been taking prescription diet pills, which could well have caused his symptoms. *See* ALJ's decision, App. C, pp. 18-19. Certainly, as is not now disputed by the Secretary and Union, General Dynamics did not violate the freon exposure standards set out at 29 C.F.R. § 1000(a)-(e). *Id.*, pp. 21-22. Petitioner requests that the Court examine the ALJ's decision generally for many other credited record facts not included in the Secretary and Union briefs. *See* Appendix C.

CONCLUSION

For the foregoing reasons, General Dynamics Requests that this Court grant its Petition for a Writ of Certiorari, reverse the decision of the United States Court of Appeals for the District of Columbia Circuit, and remand this matter to the Occupational Safety and Health Review Commission for dismissal as originally ordered by the Commission.

Respectfully submitted,

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